No. 9049

United States
Circuit Court of Appeals
For the Ninth Circuit

NORTH SIDE CANAL COMPANY, Limited, a Corporation, *Appellant*,

vs.

IDAHO FARMS COMPANY, a Corporation, *Appellee*.

BRIEF OF APPELLEE

Upon Appeal from the District Court of the United States for the District of Idaho, Southern Division

EDWIN SNOW,
Residence: Boise, Idaho;

A. F. JAMES,
Residence: Gooding, Idaho,
Attorneys for Appellee, Idaho Farms Company.

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SUBJECT INDEX

IV.

GENERAL COMMENTS ON APPELLANT'S BRIEF

TABLE OF CASES

TEXTBOOKS AND ENCYCLOPEDIAS

STATUTES

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STATEMENT OF THE CASE

(A)—Plan of Carey Act Reclamation.

This suit involves primarily the relative priority of a claim on the part of the bondholders of a Carey Act construction company to be reimbursed for the cost of constructing an irrigation system as against the subsequent claim of a Carey Act operating company for the cost and expense of operating and maintaining the irrigation works so constructed.

In order that the court may have before it the essential features of the "Carey Act" plan or method whereby the arid lands involved in this project were authorizd to be reclaimed, water rights therein sold to settlers, and whereby the parties accomplishing the reclamation of the land should be reimbursed for the construction costs, a brief outline is here pre-

sented of the salient provisions of the federal and state statutes primarily involved, together also with the pertinent provisions of the contracts under which his particular project was built and is being operated.

The original "Carey Act" of Congress, being Section 4 of the Act of August 18, 1894, (now Section 641, et seq., Title 43, U. S. C. A.), provides that the United States would donate without cost to each of the states containing desert lands a large area of such lands, conditioned upon the state causing the lands to be irrigated, reclaimed, occupied, and cultivated by actual settlers. By a subsequent amendment (Act approved June 11, 1896—now Section 642, Title 43, U. S. C. A.), the following provision was added to the original Carey Act:

> "A lien or liens is hereby authorized to be created by the state to which such lands are granted, and by no other authority whatever, and when created shall be valid on and against the separate legal subdivisions of land reclaimed, for the actual cost and necessary expenses of reclamation and reasonable interest thereon from the date of reclamation until disposed of to actual settlers".

By appropriate legislation enacted in the year 1895 (now embodied in Chapter 17, Title 41, Idaho Code Annotated—Sections 41-1701 to Section 41-1740, inclusive) the state of Idaho accepted the benefits of the congressional Carey Act and set up the

machinery thereunder for the reclamation of desert lands in Idaho.

The Twin Falls North Side irrigation project which is here in controversy was initiated by the execution of three contracts between appellee herein (whose corporate name was then Twin Falls North Side Land & Water Company) and the State of Idaho (Exhibits 1, 2, and 3). While each contract related to a separate area or "segregation" of the project, the three contracts were similar in all essential respects and by their terms were to be construed together.

By these contracts the appellee bound itself to build the irrigation works as described therein and to sell water rights therein to settlers who might enter or file upon the segregated lands. The price and terms per share at which the water rights should be sold to settlers were specified in the state contracts. Initially, of course, since the entire irrigation system was to be created by the construction company, it naturally belonged to such builder. But its proprietorship was qualified and limited. It owned it in a trustee capacity for the purpose of selling shares or water rights therein to actual settlers to whom upon completion the entire system and the water rights connected therewith were to be conveyed.

To accomplish this declared purpose, the state contracts provided for the organization of an operating company to which upon completion the whole property should be transferred. That operating

company is the appellant in this suit. Initially the entire capital stock of the operating company—authorized at 200,000 shares—was to be issued to and belong to the construction company as consideration for the building of the system (R. 185). But this was only in order to enable it to deliver to purchasers of water rights the shares of stock in the operating company which represented such water rights; thus the state contracts set forth, that

> "said shares of stock, however, shall have no voting power and shall not have force and effect until they have been sold or contracted to be sold to purchasers of land under this irrigation system.
>
> "At the time of the purchase of any water right there shall be issued to the purchaser thereof one share of the capital stock of said corporation for each acre of land entered or filed upon" (Par. 9, state contracts, R. 185).

As a part of the plan for the construction of the project, the sale of water rights therein and the subesquent operation of the system and the delivery of water for irrigation thereform, it was also provided in the state contracts (Par. 9, R. 184) that one of the functions of the operating company should be that of "operating and maintaining said canal during the period of construction and afterwards" and "the levying and collecting of tolls, charges, and assessments for the carrying on and maintenance of said canal and the management ad operation thereof."

But in accordance with the above quoted provision of the state contract to the effect that the shares of stock of the operating company "shall not have force and effect" until sold, and to elucidate the clear meaning and intent of such provision, Section 5 of Article 10 of the by-laws of the appellant operating company (Ex.8, R. 191) provides, and has always provided, as follows:

> "Section 5. All the stock of this Corporation shall be issued to and held by the Twin Falls North Side Land and Water Company, its successors or assigns, in order to enable it to deliver shares of stock to purchasers of water rights, but said shares of stock shall have no voting power and shall not have force and effect and shall not be assessable for any purpose either for maintenance or otherwise, until they have been sold or contracted to be sold to entrymen or owners of land under the irrigation system, and all assessments, maintenance and other charges must be paid by the purchaser or owner of the stock *and not by the Twin Falls North Side Land and Water Company, its successors or assigns*". (Emphasis supplied).

(B)—Brief History of the Carey Act Project Here Involved.

The project here involved was initiated in 1907. In that year two of the "state contracts" (Exs. 1 and 2) were made. Later, in 1909, the state contract (Ex. 3) covering the third segregation was executed. On November 1, 1907, a trust deed or mortgage (Ex.

9) upon the entire project and its water appropriations was executed by the construction company to certain trustees and bonds secured thereby issued by the construction company in the amount of $5,000,000.00; extensive construction work was thereupon inaugurated.

In 1913, the construction company became insolvent. There were then outstanding $3,770,000.00 of bonds. Soon thereafter a bondholders' committee was appointed. In lieu of foreclosure of the trust deed, there was turned over to this committee a majority of the capital stock of the construction company and all the capital stock of its wholly owned subsidiary, the investment company. The bondholders thus took over the completion of the system. Between 1913 and 1920 the construction work on the irrigation project was completed at an expenditure by the bondholders of upwards of $2,000,000.00 additional money. On August 6, 1920, the project was completed and accepted by the state (Ex. 10, R. 197). Shortly thereafter the project (subject to the trust deed) was conveyed in its entirety to the appellant operating company and has since been owned and operated by it.

In December, 1936, the steps were completed whereby in lieu of foreclosure of the trust deed the bondholders obtained legal title to all the assets mortgaged and pledged under the trust deed; all the balance of the capital stock of the construction company was then surrendered for the benefit of the bondholders. The investment company subsidiary was

merged into the construction company and ceased its corporate existence, the surviving corporation being the appellee which in connection with those proceedings changed its corporate name to Idaho Farms Company; the trust deed was released; all the capital stock of the construction company was re-issued to the bondholders, evidencing their proportionate interest in the assets previously mortgaged and pledged to the trustees for their benefit.

(C)—The Main Question for Decision Herein.

The main question presented for decision herein arises out of the following essential facts:

The appellee construction company during the course of the construction of the system and since has sold to settlers 170,000 shares of water rights in the system. While initially planned to irrigate 200,000 acres of land, the project involved has by agreement of all interested parties, confirmed by various court decrees, been reduced to 170,000 acres. Of the sales of water rights so made, a very great proportion have "stayed sold"; that is to say, the settlers have paid all installments of principal and interest falling due on their water purchase contracts, and have also paid the assessments for maintenance and operation levied annually by the operating company. Hence, with respect to these no controversy between the constructon company and the operating company has ever been presented. However, in the case of certain shares and the lands to which they are appurtenant, the settlers to whom such shares were sold having made default on the purchase contracts, it has

been necessary for the bondholders of the construction company to repossess the same, either by foreclosure proceedings upon the settlers' contracts or by quitclaim deeds taken in lieu of foreclosure. This property the appellee claims to hold—until resale to other settlers—exempt from assessment and in the same status and under the same conditions as if it had never been sold at all, inasmuch as the previously attempted sales have failed and come to naught; the land is not farmed or irrigated; it is awaiting re-sale to other settlers.

The appellant operating company, on the other hand, claims that by appropriate proceedings for imposing maintenance assessments during the years 1935 to 1937, inclusive, it has valid liens upon this property which are prior and paramount to any lien or claim of the construction company or its bondholders for the construction costs.

The appellee construction company (the stockholders of which in the present instance are the bondholders who actually furnished the funds which created the project) on its part asserts that the cost of reclaiming the lands involved in this suit represents under the applicable state and federal statutes a paramount lien or charge thereon; and that this paramount claim cannot be erased and wiped out through the mechanism of imposing maintenance liens upon this dormant property while awaiting resale to other settlers.

(D)—Collateral Questions.

In addition to the above basic question herein pre-

sented for decision, there are certain collateral issues which defendant interposed in its answer to plaintiff's complaint. A plea in abatement is urged based upon the alleged fact that there were pending in the state court at the time this suit was instituted certain foreclosure actions instituted by appellant for the enforcement of maintenance liens than those involved in this suit. This suit involved the liens for the years 1935-1937 inclusive. The state court suits are alleged to involve liens for the years 1932 to 1934 inclusive. Appellant also pleaded in its answer and sought to establish an *equitable lien* (R. 52) upon the property here involved, based upon allegations asserting that it had expended considerable sums of money in the repair and improvement of the irrigation works and the acquisition by purchase and lease of additional water rights; and that in equity appellee should be required to pay its ratable proportion of such expense, irrespective of the validity or priority of appellant's statutory liens; appellant further asserted (fifth affirmative defense, R. 54) that appellee by its acts and conduct is estopped from asserting in this suit the priority of its construction lien; also that the water rights appurtenant to appellee's lands had been abandoned because of the fact that no water has been used for the irrigation thereof (R. 59). The trial court held against appellant on each of these collateral defenses and appellant assigns error with respect to each. It is moreover claimed that the court erred in rejecting certain documentary evidence offered by appellant in support

of its contentions.

The precise basis of law and fact thought by appellant to support its own and the trial court's position in the various matters here in controversy are set out hereinafter under separate headings. It would seem needless repetition to present them in detail in this statement of the case.

It has not been felt practicable to pursue in the following discussion precisely the same order of argument as adopted in appellant's brief.

SUMMARY AND ARGUMENT

I

The Trial Court Properly Denied the Plea in Abatement.

(1) The United States Supreme Court is the only court of last resort which has passed precisely upon practically all the questions here presented. These questions involve both federal and state statutes and certain aspects of the case as here presented also involve the federal constitution.

> Portneuf Marsh-Valley Irrigation Company v. Brown, 299 Fed. 338; reversed by this court 5 Fed. (2d) 895; reversal upheld 274 U. S., 630; 71 L. Ed., 1243

(2) Appellant's contention, in these circumstances, that the federal courts should postpone consideration of this case awaiting some possible future pronouncement of the state courts upon similar legal questions would, if sustained, paralyze the functions of federal courts within the jurisdiction expressly conferred by Congress; such course would not be

comity but apathy and surrender.

Concordia Insurance Co. v. School District, 282 U. S., 575; 75 L. Ed., 528;

Reese v. Peck, 18 Howard, 595; 15 L. Ed., 518;

Burgess v. Seligman, 107 U. S., 20; 27 L. Ed., 359;

Southern California Edison Co. v. Hopkins, (C. C. A. 9th), 13 Fed. (2), 814, 820.

(3) Appellant claims that when this suit was brought there were pending in the state courts certain foreclosure suits brought by it involving other and different annual maintenance liens of appellant than those here involved; that therefore this suit should have been abated. The records in these state court suits were not introduced in evidence. There is nothing here to contradict the findings of the court below (R. 104) that the cause of action and issues in this suit are wholly different from those involved in the state court suits.

(4) The state court itself, by denial of appellant's application for injunction against the prosecution of this suit, reached the same conclusion (R. 50) as the federal court below.

(5) The authorities cited in appellant's brief in support of its plea in abatement are all cases where the property involved in the previous suit was in the actual or potential custody and control of the court entertaining the previous suit and where the control was essential to the jurisdiction invoked. Nothing

approaching that situation is even claimed to exist here.

(6) Even accepting appellant's statement that its prior pending suits in the state courts involved the foreclosure of the same kind of maintenance liens (but admittedly wholly different liens and for different years) as the maintenance liens here involved, such fact was no ground for abatement of this suit. No possible conflict of jurisdiction is involved.

United States v. Klein, 303 U. S. 279, 281; 82 L. Ed., 840;

Boynton v. Moffatt Tunnel Improvement District, 57 Fed. (2d), 772 (C. C. A. 10th);

Ingram v. Jones (C. C. A. 10th), 47 Fed. (2d), 135;

Morrow v. Superior Court (Calif.), 48 Pac. (2d), 188;

Watson v. Jones, 13 Wallace, 679; 20 L. Ed., 666;

Detroit Trust Company v. Manilow (Mich.), 261 N. W., 303;

National, etc. Works v. Oconto City Water Supply Co. (Wis.), 81 N. W., 125;

Franzen v. Chicago, etc. Ry (C. C. A. 7th), 278 Fed., 370;

American Seeding Machine Co. v. Dowagiac Co., 241 Fed., 875;

Frink Co. v. Erickson, 20 Fed. (2d), 707;

Royster Guano Co. v. Stedham (Ga.), 172 S. E., 555;

Lewis v. Schrader, 287 Fed., 893;
Equitable Trust Company v. Pollitz, (C. C. A. 2d), 207 Fed., 74.

(7) Under the pealdings in this case (R. 20), the federal court below had ample authority under the law of Idaho governing suits for quieting title to determine the relative priority of the liens or claims of the respective parties to the property here involved.

Section 9-401, I. C. A.
Coleman v. Jaggers, 12 Ida., 125; 85 Pac., 894;
Blackman v. Pettengill, 30 Ida., 241; 164 Pac., 358;
Hanley v. Beatty (C. C. A. 9th), 117 Fed., 59.

II

Appellee's Claim to the Property Involved Is Prior and Paramount to the Maintenance Liens of Appellant.

(1) It was so decided by this court and the United States Supreme Court in the Portneuf case, supra.

(2) The status of the respective parties in the Portneuf case and in this case are identical, as shown by the opinions and especially by comparison of the records in the two cases.

(3) The status of the property involved is identical in the two suits, as similarly shown.

(4) The same identical questions were presented for decision in the two cases:

(a) *Merger.*

While the *trial court* in the Portneuf case con-

cluded that the foreclosure of the settlers' water contracts extinguished the previous lien for construction costs, that doctrine was rejected upon appeal.

No merger of the lien in the title will be held to occur against the manifest interest of the lienholder.

Factors & Traders Insurance Company v. Murphy, et al, 111 U. S., 738; 28 L. Ed., 582;
Wilson v. Linder, 21 Ida., 576; 123 Pac., 478;
Jones on Mortgages, 8th Edition, Section 1080;
41 C. J., Section 874.

By the terms of the governing state contracts, appellee's property was initially exempt from assessment. It was obliged to make sales of water rights and was also compelled to foreclose against the settler or have its claim barred by the statute of limitations.

Meridian v. Milner, 47 Ida., 439; 276 Pac., 313.

In these circumstances, the temporary settler or contract-holder was a mere shadow, the beneficial interest sold to him remaining always in the construction company.

Bennett v. Twin Falls, etc. Co., 27 Ida., 643, 652.

The settler's water contract created as against him what is analogous to a purchase money mortgage, the interest of the settler merely passing through his hands and, without stopping, resting again in the construction company.

Keith v. Cropper, 196 Iowa, 1179;
41 C. J., 528, Sec. 470;
Section 61-405, I. C. A.;
Nelson v. Parker, 19 Ida., 727; 115 Pac., 488;
Clark v. Paddock, 24 Ida., 142; 132 Pac., 795;
Bennett v. Twin Falls, etc. Co., 27 Ida., 643, 652; 150 Pac., 336;
Kneen v. Halin, 6 Ida., 621; 59 Pac., 14.

(b) Any distinction between the form of assessments in the Portneuf case, and here is wholly to appellant's disadvantage.

In the Portneuf case, the Supreme Court of the United States expressly declared that by the terms of Section 41-1910, I. C. A., the liens here claimed by appellant under Section 41-1901 was "in terms" made subject to the Carey Act construction lien.

71 L. Ed., at page 1270.

(c) The statutory lien for construction costs attached by operation of law upon compliance with the terms of the law. Section 41-1726, I. C. A., provides that "any * * * company * * * furnishing water for any tract of land, shall have a first and prior lien on said water right and land upon which said water is used, for all deferred payments for said water

right". The Supreme Court of Idaho has declared that the construction lien attaches when water has been made available for the land.

> Columbia Trust Co. v. Eikelberger, 42 Ida., 90; 245 Pac., 78.

(d) Just as in the Portneuf case, appellee's rights are grounded upon a trust deed or mortgage upon the entire irrigation system, executed even prior to its construction. This general lien represented construction costs. Any rights that appellant has to levy maintenance assessments is subject to it.

(e) Appellant relies on the case of Bank v. Werner, 36 Ida., 602; 215 Pac., 458. The case is not in point. It merely decided that the lien of the sovereign for taxes (under statutes even antedating the Carey Act construction lien law) were paramount to a Carey Act construction lien. The Werner case is wholly inapplicable to the question of the relative priority of liens asserted by private parties.

Mere dicta, not relevant to the decision of the actual controversy before the court, is not binding either upon the court that uttered it or upon other courts.

> Bashore v. Adolph, 41 Ida., 84; 238 Pac., 534;
> Stark v. McLaughlin, 45 Ida., 112; 261 Pac., 244;
> Eldridge v. Black Canyon Irrigation District, 55 Ida., 443; 43 Pac., (2d), 1052;
> Carroll v. Carroll, 16 How., 275; 14 L. Ed., 936;

Matz v. Chicago, etc., A. R. Co. (C. C. A. 8th), 85 Fed., 180;

Leeper v. Lamson G. Neely Co., 293 Fed., 967.

The same principle applies to the case of Carlson-Lusk v. Kammann, 39 Ida., 634; 229 Pac., 85, and other cases cited by appellant with respect to the alleged priority of maintenance liens declared by Section 41-1901, I. C. A. The Idaho Supreme Court in the Carlson-Lusk case merely announced that that section of the statute was inapplicable to the controversy then before it. It had no occasion to even mention, and did not mention, Section 41-1910, I. C. A., which is a part of the same chapter of the state code and which section has been constructed by the Supreme Court of the United States in the Portneuf case as "in terms" giving appellee's construction lien priority over liens of appellant asserted under Section 41-1901.

In another suit between the parties here, Judge Guy Stevens of the Idaho District Court in a very recent opinion (printed in full as an appendix to this brief) considers all the state court cases relied on by appellant as having no bearing on the questions with respect to which they are cited by appellant in its brief here.

(f) If the language of Section 41-1901 were construed as displacing appellee's prior construction lien, wholly contrary to the interpretation put upon

that statute in the Portneuf case by the Supreme Court of the United States, the section would then be invalid because contrary to the federal Carey Act and also contrary to those sections of both the federal and state constitutions which inhibit sale legislation impairing the obligation of a contract.

37 C. J., page 329, Sec. 41;
17 R. C. L., page 611, Sec. 21;
Toledo, etc. v. Hamilton, 134 U. S., 269;
12 Am. Jur., page 354, Sec. 671, Title "Constitutional Law";
Yeatman v. King, 51 N. W., 721;
National Bank of Commerce v. Jones (Okla.), 91 Pac., 191;
Baker v. Tulsa Building & Loan Assn. (Okla.), 66 Pac. (2d), at page 49;
Barnitz v. Beverly, 163 U. S., 118; 41 L. Ed., 93.

The federal Carey Act in saying that the construction lien "*when created shall be valid*" asserted the ordinary meaning of "validity"; that is, incapable of being rightfully overthrown or set aside by subsequent legislation.

King v. Fraser, 23 S. C., at page 567;
Emerson v. Knapp, 75 Mo. Appeals, 92, 97;
U. S. v. McCutcheon, 234 U. S., 702;
Edwards v. O'Neal (Tex.), 28 S. W. (2), 569, 572.

III
COLLATERAL ISSUES

(1)—Appellee Is Not Estopped From Contesting the Validity of Appellant's Assessments.

There is no testimony in the record that appellant would have acted any differently than it did in any respect regarding its maintenance assessments here involved (1935-1937 incl.) or with respect to making any expenditures out of moneys collected from such assessments in reliance on any act or conduct of appellee (R. 108.) This indispensable element of estoppel is wholly lacking. Where both parties have equal knowledge of the matters relied upon as constituting estoppel, estoppel cannot be invoked.

Cahoon v. Seger, 31 Ida., 101; 168 Pac., 441;
Sullivan v. Mabey, 45 Ida., 595; 264 Pac., 233;
Johansen v. Looney, 31 Ida., 754; 176 Pac., 303;
National Surety Co. v. Craig, 220 Pac., 943;
Midwest Lumber Co. v. Brinkmeyer, 264 Pac., 17, 19;
Brant v. Virginia Coal & Iron Co., 93 U. S., 326; 23 L. Ed., 927.

All the acts of Mr. R. E. Shepherd relied upon by appellant as constituting estoppel were performed while Mr. Shepherd was general manager of appellant company. In these circumstances, though Mr. Shepherd was also manager of appellee, neither cor-

poration will be held to have waived any right by reason of any act of his.

Vol. 14-A Corpus Juris, 365.

The fact that appellee paid certain assessments on its property up to and including the year 1931 constitutes no waiver of its rights to contest the assessments here. Appellant well knew when the assessments here involved were levied and expenditures therefrom made that appellee for from three to five years prior had been refusing to pay any assessments upon its property.

"The essence of waiver is estoppel, and when there is no estoppel there is no waiver".

67 C. J., page 294;

Globe Mutual Life Ins. Co. v. Wolff, 95 U. S., 326; 24 L. Ed., 387, at page 389;

Williams v. Neeley (C. C. A. 8th), 134 Fed., 1;

Hawkins v. Smith, 35 Ida., 349; 205 Pac. 188.

Payment of illegal assessments cannot estop the person paying them from refusing to continue to pay the illegal exactions.

Gibson v. Iowa Legion of Honor, 159 N. W., 639;

O'Malley v. Wagner (Ky.), 76 S. W., 356;

Juett v. Cincinnati Railroad Co. (Ky), 53 S. W. (2d), 551;

Williams v. Harrison (Ind.), 123 N. E., 245;

Quaschneck v. Blodgett, 156 N. W. 216.

"A waiver, like a gift, can only operate in praesenti".

Gardner v. Clark, 21 N. Y., 399;

Johnson v. Nevada Packard Mines Co., 272 Fed., 291, at page 305;

Walsh v. Howard & Childs, 113 N. Y. Supp., 499, 502;

Rice v. Fidelity & Deposit Co. (C. C. A. 8th), 103 Fed., 427, 435.

Any alleged acts of acquiescense to be effective as an estoppel must be such as to mislead a party who is entitled to rely thereon and who has changed his position to his disadvantage by reason thereof.

21 C. J., Section 222, page 1217.

(2)—The Trial Court Properly Rejected Exhibits 33 and 34 and Like Testimony.

After this suit was begun by appellee to determine the validity and relative priority of the maintenance liens of appellant for the years 1935 to 1937 as against appellee's liens for construction costs, and after appellant had appeared herein, it brought several suits in the state court to foreclose the *identical maintenance liens* involved in this suit.

One of the statutes under which appellant claims its liens (Section 41-1905, I. C. A.) provides that a canal company, in order to preserve its maintenance liens, must within two years begin suit to enforce them "*in a proper court*".

At the trial of this suit, appellant sought to prove the preservation of its 1935 and 1936 maintenance liens by evidence of having (wrongfully, we think) brought the foreclosure suits in the state courts under the circumstances above recited. Appellee's objection to this evidence was sustained (Exhibits 33 and 34; R. 219) on the ground that such attempt by appellant to thus create a head-on collision between the jurisdiction of the different courts with respect to the same identical cause of action and the identical maintenance liens here involved should not be treated as a compliance with the statute above cited, which required the bringing of the suits for foreclosure "in a proper court". We think the term "a proper court" as used in the statute means a court having at the time the suit is filed jurisdiction to foreclose the lien. This jurisdiction the state court did not have at the time appellant's foreclosure suits were filed because the federal court by this suit had at the time exclusive jurisdiction to deal with those identical liens.

Admittedly, the bringing of the later suits in the state court could have been prevented by injunction. If so, they could not be said to have been brought in the proper court. Two courts could not have at the same time jurisdiction to determine the validity of identical liens on the identical property: A conflict of process inevitably must result.

In the case of Covell v. Heyman, 111 U. S., 176; 28 L. Ed., 390, 393, the United States Supreme Court said:

> "* * * when one (court) takes into its jurisdiction a specific thing, that res is as much withdrawn from the judicial power of the other as if it had been carried physically into a different territorial sovereignty".

The trial court's rulings primarily involved the construction of Section 41-1905, I. C. A. Appellant's lien for the year 1935 had admittedly lapsed unless preserved by the state court suits. This is not so as to the 1936 and 1937 liens which had not lost their status by limitation of time.

(3)—Appellee's Alleged Claim of "Offset" to Appellant's Statutory Assessments.

In specifications of error Nos. 8 and 15 and in appellant's discussion of them on page 82 of its brief, it is stated that appellee claims an "offset" against appellant's statutory assessments here involved, by reason of the fact that water was not used on appellee's property during the years here in question; also that the trial court erroneously admitted evidence (R. 256, 257) in support of such claim; and found as a fact (R. 105, 106) relevant to such claims and "on the same theory" that appellee's water rights had not been used on its lands, but had instead been used by appellant on the lands of its other stockholders.

No such claim of "offset" was or is made by appellee nor was the trial court's said finding or its admission of such evidence based upon any such theory. Certainly there is no authority in law for

any such alleged "offset" to appellant's *statutory assessments.*

The court's finding of fact and its ruling on the said evidence was on a wholly different theory and for wholly different reasons. It was because appellant pleaded in its third affirmative defense (R. 52) an *equitable lien* upon appellee's property for expenditures made in the improvement of the irrigation system. It also pleaded (R. 58) that appellee had lost its water rights by non-user and abandonment.

Upon the issues so raised by both these defenses the evidence received by the court and of which appellant complains was highly relevant, and the finding of fact of which appellant complains was wholly pertinent to these same defenses.

Appellant both in its specification of error and in its argument on this point wholly distorts both the trial court's position and appellee's position.

(4)—Abandonment of Appellee's Water Rights.

Appellant pleaded (R. 58) as a defense that appellee's water rights had been lost through non-user and abandonment; and alleges as error (Specification No. 6) the trial court's failure to sustain the claim (R. 113). The point is discussed on page 81 of appellant's brief.

While appellee's water rights have not been used on appellee's property here involved, the water represented thereby has been continuously used by appellant itself upon the lands of its other stockholders, to their great benefit; appellant holds the legal title

to the water in a trustee capacity for all of its stockholders; it cannot assert abandonment, forfeiture, or prescriptive right against any of them. Moreover, all the stockholders of appellant company are tenants in common in the water rights of this Carey Act project, the waters having been appropriated for the benefit of the project as a whole, according to the terms of the state Carey Act contract; the use of water by one tenant in common is deemed to be use by all. The statute relied on by appellant (Section 41-216, I. C. A.) has no application here. There was no abandonment or forfeiture. Appellant makes no serious attempt to controvert the foregoing principles as announced in the trial court's opinion (R. 165, 166) nor the authorities cited by the court in support of them; a legion of other authorities might be adduced to support the principles here asserted.

IV

General Comments on Portions of Appellant's Brief.

(1) Appellant complains that the trial court's decree exempted appellee's property from assessment. The exemption granted is only a limited and qualified one. It merely permits appellee to obtain its authorized construction cost of the project out of the property before being deprived of it by intervening maintenance assessments. Appellant in its brief repeatedly urges that the relationship of the construction company and the bondholders to a Carey Act project is a trustees relationship; that it is a mere agency or instrumentality of the state and federal

government for the purpose of passing title to water rights to others in the irrigation system it has created, and which it shall do without profit. This is precisely the view adopted by the trial court; and the qualified exemption from assessment which the court decreed is strictly limited and qualified so as to permit appellee to obtain if it can only its construction costs from the property reclaimed — and without profit. Certainly the federal Carey Act should not be construed (contrary to its plain terms) to provide a method, direct or indirect, whereby the very agency selected by the state to reclaim the land, should obtain a monopoly upon the land reclaimed.

Appellant, to advance the interest of some of its stockholders, refuses to accept that doctrine.

(2) Appellant further argues that exemption from assessments is never presumed and should not rest upon implication. It does not here rest upon implication. The Supreme Court of the United States in the Portneuf case, 71 L. Ed., 1269, stated:

> "The question may be resolved without exclusive reliance upon implications to be found in the general nature and purpose of the (Carey Act) plan itself".

Comparison of the pertinent contracts and by-laws of the operating company as disclosed by the record in the Portneuf case and the same documents in this case will show that the plain meaning and intent of the governing instruments on both projects, construed in the light of the controlling federal and state

statutes, effectuate an *express* exemption from assessment to the precise extent decreed by the trial court here, but no further.

(3) Appellant further asserts that Section 41-806, Idaho Code Annotated (formerly Section 5631, Compiled Statutes) antedates even the Carey Act construction lien law, being a prior act of the same legislative session (1895) and that such statute asserts the priority of its maintenance liens. The statute is wholly inapplicable. It is conceded that water has neither been furnished or delivered to appellee's lands here. And the statute declares a lien only for water "furnished and delivered".

Moreover, a consideration of the original act of the legislature (Laws 1895, page 174), of which what is now Section 41-806 is only a part, shows plainly that the lien granted was a lien for the *purchase price* or *rental value* of water given to companies constructing irrigation projects for purposes of rental and sale, and is not at all a lien for maintenance such as appellant here asserts. If it has any bearing at all, the statute supports appellee's contention and not appellant's.

This precise section was the entire subject matter of opposing briefs requested by this court in considering whether to grant a rehearsing in the Portneuf case. To avoid useless repetition, reference to those briefs is hereby respectfully made. While perhaps *appellee* could confidently rely upon Section 41-806 alone in support of the priority of its lien, it is

thought that the Carey Act construction lien statute (Section 41-1726), being special legislation relating to a precise character of enterprise, has the more direct bearing.

Of necessity, this "Summary of Argument" omits various perhaps minor but still important matters. These are amplified in the argument which follows and to which the court is respectfully referred.

ARGUMENT

I.

(A)—The Trial Court Properly Denied the Plea in Abatement.

This suit was begun by appellee on November 24, 1937. The complaint, after setting out the pertinent history of the project and the instruments and proceedings whereby it acquired the property here involved, states that appellant has from time to time levied certain pretended assessments upon the lands and water rights listed and described; and that appellant asserts that by reason thereof it has a claim or lien upon said parcels of property, and each of them, which is prior and paramount to appellee's title and claim; but to which in fact appellant's claim is subordinate (R. 19, 20). The complaint prayed that appellant should be required to set forth the nature of its liens or claims and that the relative priority or status of the conflicting claims of the parties be determined.

The record here discloses that at the time this suit was filed appellant was claiming liens upon the property involved, based upon maintenance assess-

ments for each of the years 1931 to 1937, inclusive. These liens represented the alleged annual cost of operating and maintaining the irrigation system and delivering water therefrom.

It is alleged in appellant's answer (R. 49) that at the time this suit was commenced, twelve suits were then pending in the state district courts of Idaho for the foreclosure by appellant of certain maintenance liens for the years 1932 to 1934, inclusive.

While no proof was offered by appellant with respect to these prior suits, and hence it does not appear when they were filed, it may by conclusive inference be known that they had been pending for several years, if the liens sought to be foreclosed in those suits were similar in form and character to the liens asserted in this suit. Section 41-1905, Idaho Code Annotated, provides that to be effective such foreclosure suits upon liens of the character asserted by appellant in this suit must be filed within two years after recording the statement of the annual lien. Therefore, the suit on the 1932 assessment lien must on November 24, 1937, have been pending three years or longer if the lien sought therein to be foreclosed was similar to the liens asserted by appellant in this suit. Since the record of these alleged suits was not offered in evidence, it does not here appear what was the character of the liens asserted, what property was affected, or what precise issues were involved.

In addition, however, to such liens claimed by appellant for the years 1932 to 1934, inclusive, in-

volved in the then pending state court suits, the record herein does clearly disclose that appellant was also claiming against appellee's property maintenance liens for the years 1935, 1936, and 1937. Upon none of these liens had appellant begun foreclosure suits in any court prior to the time this suit was filed.

In these circumstances, both to avoid a great multiplicity of suits and possible conflict of decision by several courts, appellee brought this action to determine in one proceeding (in the one court having territorial jurisdiction over the entire property involved) all conflicting claims of the parties hereto upon the property involved. Thereupon, appellant made application to the District Court of Jerome County to enjoin the prosecution of this suit. That court, after hearing, made its order enjoining the prosecution of this suit, only in so far as it affected the subject matter of the prior litigation in that court; that is, certain assessment liens for the years 1932 to 1934, inclusive (Statement of appellant's counsel, R. 213). Following that order, and pursuant to stipulation between the parties, a disclaimer was filed by appellee, eliminating any controversy whatever in this suit respecting any of the 1932, 1933, and 1934 liens of appellant (R. 50; 213). So it sought in this suit to quiet its title only against the separate maintenance liens of appellant asserted for the years 1935, 1936 and 1937. The case was tried upon such stipulation and theory and the relief granted by the trial court was restricted solely to the issues so made.

The record herein also discloses that after the filing of this suit and appellant's appearance herein, appellant then commenced four additional suits in the state courts to establish and foreclose its maintenance liens for the years 1935 and 1936. No suit has been begun in any court to enforce appellant's 1937 lien.

In the situation thus presented, it is now claimed by appellant that the trial court should have abated this suit by appellee to quiet its title to the property involved because of the pendency in the state courts of those foreclosure suits relating to appellant's other alleged liens for the years 1932 to 1934, inclusive. It is thought that this contention cannot prevail for the following cogent reasons:

(1) The court below found that the subject matter of each of the suits pending in the state courts was wholly different and distinct from the subject matter of this suit and that the questions, controversies, and issues raised were not the same (R. 104). There is nothing whatever in the record to controvert this finding.

(2) The *state trial court* decided that the prosecution of this suit for quieting appellee's title as against any claims or liens asserted for the years 1935 to 1937 would in no matter conflict with its jurisdiction in the previously pending suits; because, as admitted in appellant's answer herein (R. 49), while appellant applied to the state court to enjoin the prosecution of this action, its application was

granted only in so far as it affected any liens for the years involved in the then pending state court litigation (R. 50). This should be conclusive. The Federal Court should not thrust upon the State Court a cause as to which it had expressly waived any right to claim jurisdiction.

(3) Assuming for the moment that the liens asserted for the prior years and involved in the prior state court litigation were of similar character to those asserted for the years here in controversy, the correctness of the trial court's finding herein (R. 104) to the effect that "the lien claimed by the defendant herein for maintenance and operation for each year depends for its validity (among other things) upon the timeliness, regularity, and propriety of the proceedings done and taken by defendant at wholly different times in order to effect and enforce the same," is readily apparent.

Section 41-1902, I. C. A., provides that in April of each year the company claiming the maintenance lien for that year shall file a statement of the charge, etc. and the date or dates when payable. Section 41-1903, I. C. A., provides that or after the first day of November and prior to the first day of January thereafter, the company shall file its claim of lien of specified form and content. It is thus apparent the lien for each year, even though it might involve a similar legal question, involves also wholly distinct and separate questions.

It is true that the court below found (R. 99-101) that the proceedings of appellant were regular with

respect to the levy and recording of the three annual liens of appellant involved in this suit, but it by no means follows that these matters were not controverted below. For instance, it was and is claimed by appellee that there is no evidence in the record establishing that any levy for any of these years was ever made, as no resolution of the board of directors of appellant showing such levy was presented in evidence. Moreover, it is appellee's position that if the recitals in the respective notices and claims of lien are taken as proof of the levy, nevertheless they show on their face that the assessments were not "equally and ratably levied" as required by Section 41-1901, in this: That it is shown on the face of the recorded notices (R. 63) that a credit of twenty-five cents per share was allowed by reason of the use upon other lands of the project of certain water rights appurtenant to the lands of the first segregation; while the record here conclusively shows and the court found *that without similar credit* "defendant and its stockholders (other than plaintiff) have continuously for many years used the water appurtenant to plaintiff's lands upon lands of the project belonging to such other stockholders" (R. 106).

Having taken no cross appeal, appellee is not in position to ask this court to review these matters, and we point them out merely to negative the statement found on page 39 of appellant's brief to the effect "The procedure for effecting appellant's lien is inconsequential. There is no controvery as to the date, form, or contents of the liens or statements filed by

appellant. The controversy is wholly as to their statutory effect upon appellee's lands".

(4) Since no prior litigation whatever was pending in the state courts with respect to the liens here involved, and since this a suit only to quiet title against the recorded liens for the years 1935 to 1937, inclusive, it is perfectly obvious that it was not within the scope of any prior litigation to afford appellee the relief to which it was entitled in this suit. The state court litigation had nothing to do with the liens here involved. It was hence the plain duty of the federal court to afford appellee relief with respect to appellant's liens here involved if appellee was shown by the proof to be entitled to such relief.

(5) None of the cases cited by appellant in support of its plea in abatement go to the extent necessary to aid its plea. They are all merely to the effect that when a proceeding in rem is pending in any court, that court has exclusive jurisdiction of the property involved to the extent necessary to effectuate its judgment according to the scope of the proceeding in which its prior jurisdiction is invoked—but no further. Appellant in effect claims that because it has brought a suit in the state court for the foreclosure of a specific lien upon certain property, it may cumber the records with countless other and different claims of lien and that no court except that in which its foreclosure of the one lien is pending has jurisdiction to quiet title as against the other claimed

liens, concerning which no litigation is pending. No decsions go so far.

The cases cted by appellant are all cases where the prior litigation had resulted in the actual custody of the property by the court in which the prior suit was pending; or where the scope of the litigation required such custody. In such circumstances, the property was in the actual or potential custody of the court; and all conflicting claims to such property must then necessarily be determined by the court having or contemplating such custody. No such situation is presented here.

(6) Even with respect to property in possession of a court, the true rule is thus stated in United States v. Klein, 303 U. S. 279, 281; 82 L. Ed., 840, 843, as follows:

> "While a federal court which has taken possession of property in the exercise of the judicial power conferred upon it by the constitution and laws of the United States is said to acquire exclusive jurisdiction, the jurisdiction is exclusive only in so far as restriction of the power of other courts is necessary for the federal court's appropriate control and disposition of the property (citing authorities). Other courts having jurisdiction to adjudicate rights in the property do not, because the property is possessed by a federal court, lose power to render any judgment not in conflict with that court's authority to decide questions within its jurisdiction and to make effective such decisions by its control of

the property (citing authorities). Similarly a federal court may make a like adjudication with respect to property in the possession of a state court" (citing numerous authorities).

We quote from Boynton v. Moffatt Tunnel Improvement District, 57 Fed. (2d), 772 (C. C. A. 10th), as clarifying and elucidating the meaning of certain general expressions used by the Supreme Court of the United States in cases cited by appellant:

"A recent case is Harkin v. Brundage * * * the decision of which, in our judgment, controls the disposition of this case. In that case the federal court appointed a receiver in an action brought by a creditor. Prior to the filing of the bill in the federal court, a stockholder had filed a bill in the state court, in which a receiver for th esame properties was applied for. Both cases were quasi in rem; in both cases, control over the same properties was applied for. Both cases effectuate any decrees which might later be made. The same res was involved in the two suits. The state court was prior in time, and, by the general rule, was therefore, prior in right. But the Circuit Court of Appeals held that the two actions were so different that there was no conflict between the two jurisdictions, and that therefore the federal court should proceed, irrespective of the pendency of the state court action. Harkin v. Brundage (C. C. A. 7), 13 Fed. (2d),

617. The Supreme Court reversed this ruling upon another point, but held that the holding of the lower court was correct in this respect * * *.

"Applying that rule to the facts, the (Supreme) court said at page 45 of 276 U. S.: 'We conclude that if the decision of this motion turned on the question of priority of jurisdiction on the face of the two bills, it could not be said that the courts were exercising concurrent jurisdiction. The creditor's bill conferred on the court the power to enjoin the judgments and executions of creditors and the establishment of undue preferences among the creditors, whereas in the stockholder's bill no such remedy was asked and could hardly be afforded without amendment and further allegation and prayer'.

"The Supreme Court relied upon the opinion of Judge Grubb in the leading case of Empire Trust Company v. Brooks (C. C. A. 5th), 232 Fed., 641, and characterized it as 'a carefully reasoned opinion'."

In that case Judge Grubb said:

"However, where the issues in the subsequent suit are different from those involved in the first suit, and the subject matter is not identical, there can be no infringement of the jurisdiction of the court in which the first suit is pending, by reason of the institution of the second suit in a court of concurrent jurisdiction. * * * Unless it can be said that the issues involved, the relief

> sought, and the parties to the suit in the federal court were included substantially in the lis pendens of the prior suit in the state court, the jurisdiction of the former did not conflict with that of the latter".

The case of Ingram v. Jones (C. C. A. 10th), 47 Fed. (2d), 135, is almost precisely in point here and illustrative of the principles governing alleged conflicts of jurisdictions in actions in rem. On May 25, 1923 the guardians of Leonard Daniel Ingram brought suit in the state court of Oklahoma to foreclose a mortgage belonging to their ward. Richard Love, one of the mortgagors, filed an answer and cross-complaint setting up fraud in the giving of the mortgage and prayed that it be cancelled. Ingram (who had meanwhile become of age) answered the cross-complaint, denying the fraud. On December 5, 1926, while the case was still pending in the state court, Ingram brought suit in the federal court asking the foreclosure of the same mortgage and also the foreclosure of a prior mortgage given by the mortgagors to one Campbell which Ingram claimed to have paid off from the proceeds of his loan and to the rights under which he claimed subrogation by reason of such payment. The federal trial court dismissed the suit by reason of the pendency of the state court action. On appeal, the Circuit Court of Appeals said:

> "On the other hand, where the issues in the subsequent suit are different from those involved in the first suit and the subject matter is

not identical; that is, where the two suits involve different controversies, notwithstanding they relate to the same property, there can be no infringement of the jurisdiction of the court in which the first suit is pending by reason of the institution of the second suit in a court of concurrent jurisdiction * * *.

"A decree foreclosing the Campbell mortgage will in nowise interfere with the jurisdiction of the state court * * * invoked by the answer and cross petition of Robert Love seeking cancellation of the Ingram mortgage on the ground of fraud. It follows that the instant suit may properly proceed for the subrogation of Ingram to the lien of the Campbell mortgage and for the foreclosure thereof. The decree is reversed", etc. * * *.

In the case of Morrow v. Superior Court (Calif.), 48 Pac. (2d), 188, decided August 16, 1935, the court was considering a conflict of jurisdiction between two state courts in rem.

"The issues in the two suits are not identical and the most that can be said is that both cases relate to the same land. The plaintiff in the second action did not choose to intervene in the state court but saw fit to file suit in the federal court, setting forth a cause of action against all of the parties to the first action * * *.

"The state court had not taken possession or control of the land and had not been asked to

determine all controversies relating to the title thereto but only those based upon one contract and as between certain parties. A new controversy is involved in the second action."

The proper scope of the rule and its limitations is succinctly stated by the Supreme Court of the United States in Watson v. Jones, 13 Wallace, 679; 20 L. Ed., 666, as follows:

"But when the pendency of such a suit is set up to defeat another, the case must be the same. There must be the same parties, or at least such as represent the same interests; there must be the same rights asserted and the same relief prayed for. This relief must be founded on the same facts, and the title or essential basis of the relief sought must be the same. The identity in these particulars should be such that if the pending case had already been disposed of it *could be pleaded in bar as a former adjudication of the same matter between the same parties*". (Emphasis ours).

Though the foregoing decision was rendered many years ago, it is still considered good law, as shown by the case of Detroit Trust Company v. Manilow (Mich.), 261 N. W., 303, decided June 3, 1925. It is said:

"As a rule, when a court of competent jurisdiction becomes possessed of a case, its authority continues until the matter is finally and completely disposed of, and no court of co-ordinate

authority is at liberty to interfere with its action * * *. However, this rule is subject to the limitation that the two proceedings must be in all respects identical as to the identity of the parties, the subject matter involved, the nature of the remedies, and the character of the relief sought."

A suit in rem in one court where such court has not taken the property into its custody or control is not a bar to a second suit in rem in another court which involves different issues but affects the same property.

"But it is not the law that the commencement of a suit in the federal court to enforce a mechanic's lien on property, precludes the foreclosure of a mortgage on the same property in the state court. The lien action was not one in rem except in a qualified sense. There was no seizure of property and no possession of it taken by the court or necessary to it at any stage of the proceeding. The situation was essentially different from one where the property is in the actual custody of the court".

National, etc. Works v. Oconto City Water Supply Co. (Wis.), 81 N. W., 125.

"Condemnation proceedings involving the same land pending in the state court are no bar to the maintenance of a similar action in a federal court, where the state court in taking jurisdiction did not take possession of the res".

Franzen v. Chicago, etc. Ry. (C. C. A. 7th), 278 Fed., 370.

"It is a general rule, strongly fortified by both reason and authority, that one will not be restrained by injunction from proceeding with a pending suit in equity in the courts of another jurisdiction except to prevent a manifest wrong or injustice; or otherwise stated, unless it clearly appears that full and complete relief cannot be obtained in such pending suit".

American Seeding Machine Co. v Dowagiac Co., 241 Fed., 875.
Frink Co. v. Erickson, 20 Fed. (2d), 707.

Pendency of suit to enjoin exercise of powers of sale in security deeds and for accounting and cancellation of deeds where court took no action equivalent to seizure of res, held not to authorize enjoining grantee from suing on security deeds in federal court. (Syllabus).

Royster Guano Co. v. Stedham (Ga.), 172 S. E., 555.

"If the parties were the same in the state court suit and if the issues and controversy were the same that they are in this court, even though the action is mildly in rem and neither court has taken possession or control of the res, I would sustain the plea in abatement or as such plea is now called, the motion to dismiss; but with the difference between the suits, in parties, issues

and prayers, the motion does not seem to be well taken".

Lewis v. Schrader, 287 Fed., 893.

"Assuming that the federal courts have possession of the res, it follows that they should enjoin proceedings in the state court affecting such possession; but questions not involving such possession may properly be litigated in the court which first acquired jurisdiction".

Equitable Trust Company v. Pollitz (C. C. A. 2d), 207 Fed., 74.

The citation of the above authorities on the part of appellee is doubtless superfluous. Even brief reflection by this court must result in the same conclu- County and by Judge Cavanah to the effect that no possible action that the federal court might take in this suit with reference to the liens for the years 1935 to 1937, inclusive, could have any possible effect upon the suit or suits pending in the state courts at the time of the commencement of this suit. If in this suit the appellant's liens here involved were declared invalid by the federal court, in accordance with the prayer of appellee's complaint, such determination could have no possible effect on the custody or control of property which no other court had in its possession either actually or constructively.

(7) It is urged by appellant that the court below should have abated this action because the case is asserted to turn upon the construction of state

status involved in the foreclosure suits pending in the state court, and that the federal court should have indefinitely stayed proceedings in this action to await some possible construction by the state supreme court of the statutes involved.

This is a novel doctrine. Adherence to it would indefinitely paralyze the functions of federal courts within the sphere of jurisdiction expressly conferred upon them by the acts of Congress. It is elementary that a federal court not only should not but cannot abrogate the functions imposed upon it by law.

> "As a sequel to what we have said, we hold that the district court was correct in the opinion that it had jurisdiction * * * but we think it erred in declining to exercise the jurisdiction. Decision that there was power to hear and determine removed any question of discretion and left a bounden duty to proceed to a decree".
>
> Southern California Edison Co. v. Hopkins (C. C. A. 9th), 13 Fed. (2), 814, 820.

But an additonal and cogent reason why the lower court should have proceeded with this case is that it primarily involved issues controlled in part by *federal statutes* and the Federal Constitution and that the precisely identical questions presented had already been determined by this court and by the Supreme Court of the United States in the case of Brown & Chapin, Trustees v. Portneuf-Marsh Valley Canal Company, 299 Fed., 338; reversed by this court 5 Fed. (2), 895; reversal upheld 274 U. S.,

630; 71 L. Ed., 1243. For brevity, we shall hereafter refer to that case as "the Portneuf case".

In these circumstances, it was especially the duty of the court below to apply to the controversy the law so declared.

Concordia Insurance Co. v. School District, 282 U. S., 575; 75 L. Ed., 528;
Reese v. Peck, 18 Howard, 595; 15 L. Ed., 518;
Burgess v. Seligman, 107 U. S., 20; 27 L. Ed., 359.

(8) It is briefly suggested under certain headings in "Summary of Argument" in appellant's brief (headings 4 and 5, pages 22 and 23) that this being a suit to quiet title, the scope of such proceedings is not broad enough to enable the court to determine the relative priority and dignity of the conflicting claims asserted. The trial court found otherwise (R. 110, 149) and its conclusion was correct. Under the pleadings in this case (R. 20), the court has, under the applicable state and federal law, full authority to determine the relative dignity and priority of any conflicting claims or liens asserted by the parties.

Section 9-401, I. C. A.,
Coleman v. Jaggers, 85 Pac., 894; 12 Ida., 125;
Blackman v. Pettengill, 164 Pac., 358; 30 Ida., 241;
Hanley v. Beatty (C. C. A. 9th), 117 Fed., 59.

II.

APPELLEE'S CLAIM TO THE PROPERTY HERE INVOLVED IS PRIOR AND PARAMOUNT TO APPELLANT'S ALLEGED MAINTENANCE LIENS.

(A)—This Case Is Controlled by the Portneuf Case, Supra.

It is thought that the Portneuf case, supra, completely controls the issues here presented for decision. We believe that an examination of the various opinions of the various courts in that case and the briefs and record upon which those opinions are based will show that every contention that can be urged by appellant in the case at bar were met and disposed of adversely to it in the Portneuf case, and that no distinctions whatever between that case and this can be pointed out with respect either to the status of the parties, the status of the property involved, or the issues presented. That case involved a Carey Act irrigation project in Bannock County, Idaho, was decided by the trial court in harmony with appellant's contentions made in this case, was reversed on appeal by the unanimous decision of this court, and upon certiorari to the Supreme Court of the United States the decision of this court was unanimously upheld. In the case at bar the court below after very careful examination of the opinions, briefs, and record in the Portneuf case, has concluded "that the issues presented and decided and the status of the respective parties are identical in every respect" (R. 163). The printed record and briefs in that case on appeal to this court are on file here

(No. 4405); and to demonstrate the correctness of the conclusion reached by the trial court and to elucidate the identity of the issues decided, it will be necessary to refer to such record and briefs.

(B)—Status of the Parties in the Portneuf Case As Compared to Status of the Parties in the Present Case.

In the Portneuf case, the plaintiffs were trustees for the bondholders of the project and the suit was brought against the construction company and the operating company for the foreclosure of the trust deed covering the project. The construction company made default, leaving the operating company as the only defendant. The object of the suit, in so far as relief against the operating company was concerned, was to establish the priority of the lien of the bondholders for construction costs as against the lien of the operating company for maintenance assessments. It was, in effect, a suit to quiet title of the bondholders against the assessments of the operating company (Portneuf R. 45—prayer of complaint).

In the Portneuf case, the operating company in its answer to the complaint (Portneuf R. 102) set up the lien of certain assessments for operation and maintenance, and the sole question before the court was the priority of the assessment liens of the operating company as against the lien of the bondholders for the cost of reclaiming the land.

In the case at bar, the relative status of the parties is identical. Again, this is a suit to quiet title by the bondholders against the operating company's assessments: The Idaho Farms Company is really the bond-

holders because the assets originally secured by the trust deed upon the project have been turned over to the bondholders in lieu of foreclosure. While in the Portneuf case the construction company, as stated, made default in the foreclosure action and thus eliminated any consideration of its equity, in this case, the construction prior to this suit had by voluntary transfers of the mortgaged property and the reissuance of its capital stock to the bondholders made the latter the sole parties in interest. The detailed circumstances of this voluntary transfer to the bondholders are set out in the trial court's opinion and findings and are in no respect controverted (R. 147; 90, 92).

Appellant vigorously urged in the court below, and to some extent suggests here, that because the transfer to the bondholders of the property here involved has been accomplished by voluntary action in lieu of foreclosure of the trust deed (Ex. 9; R. 191) and the trust deed has been released of record the bondholders cannot now assert the same rights in the property as the trustee for the bondholders might have done.

We think this position is wholly untenable. The law will imply no merger of the trust deed to appellee's disadvantage and to the benefit of appellant's secondary liens. The authorities to this effect are unanimous. We shall hereafter cite a few of them under another heading. So it is clear that the controversy here, as in the Portneuf case, is a controversy between the bondholders of the project and the operating company as to their respective claims upon

the property involved. In each case, the construction company, prior to the building of the system or the sale of water rights therein, had mortgaged it in its entirety to secure money for construction costs; so the status of the contending parties here and in the Portneuf case are identical.

(C)—Identity of Status of Property Involved in Portneuf Case.

Appellant claims that the Portneuf case is distinguishable from this case in that the property involved here comprises land and water rights acquired by foreclosure of the previously existing settlers' water contracts or by quitclaim deeds in lieu of foreclosure. While it is insisted that in the Portneuf case the property involved was not in such condition; and that the controversy in the Portneuf case related merely to the relative rights of the construction company and the operating company with respect to maintenance assessments levied prior to the foreclosure of the water contracts or prior to quitclaim deeds taken in lieu of foreclosure.

But again no such distinction exists. An examination of the records and files in the Portneufcase, together with the opinions of the successive courts deciding the case, shows that a large part of the property there involved was in precisely the same status as are the lands and water rights involved in this suit.

Among the properties involved in the Portneuf case with respect to which the bondholders' claim was held paramount to the operating company's lien were

lands and water stock acquired by foreclosure of the individual settlers' contracts. Exhibit "D" introduced in evidence in that case clearly discloses this (Portneuf R. 214, et seq.). This Exhibit "D" is a list of sheriff's deeds taken on foreclosure and running to the plaintiff trustees for the bondholders under the trust deed. Plaintiffs' Exhibit "D-1" in the Portneuf case (Portneuf R. 217) is a typical sheriff's deed illustrating the method by which the property was so acquired. The property shown and listed in Exhibit "D" in the Portneuf case is, therefore, in the precisely identical status as those properties of defendant in the present case which are lsited in Exhibit I attached to the findings (R. 114) as acquired on foreclosure of water contracts.

Again, Exhibit "E" in the Portneuf case (Portneuf R. 221) is a list of lands and water rights acquired by quitclaim deed in lieu of foreclosure of the Carey Act contracts involved. The record there discloses that these quitclaim deeds were taken in the name of W. Rodman Peabody as agent of the bondholders and their trustees for the purpose of avoiding foreclosure proceedings under the water contracts (Portneuf R. 144). Plaintiffs' Exhibit "E-1" in the Portneuf case (R. 225) is a typical quitclaim deed, illustrative of the group of conveyances by which this property was thus acquired.

In the present case, part of the property here involved, as shown by Exhibit I attached to the findings (R. 125, et seq.) was acquired under precisely similar quitclaim deeds under precisely similar cir-

cumstances and is in precisely the same situation. In the Portneuf case, the quitclaim deeds were taken in the name of Peabody as agent for the bondholders and their trustees. In this case, the quitclaim deeds were taken in the name of the Investment Company, all of the capital stock of which was in the hands of the bondholders' committee and which as shown by the undisputed evidence and the findings (R. 203; 90), has been since 1913 the mere agent and instrumentality of the bondholders for the holding for resale and the reselling of the repossessed properties. The status and function of the Investment Company in the present suit is precisely the status and function of W. Rodman Peabody in the Portneuf suit; that is, in both instances for convenience the title to the repossessed properties was taken in the name of a mere agent of the bondholders who held the property in trust for them until resale to other settlers (R. 162).

An examination of Exhibit "E" in the Portneuf case (Portneuf R. 221) discloses that the lands so acquired by quitclaim deeds were acquired in the years 1919 and 1920. The defendant operating company in the Portneuf case relied for its liens upon various assessments levied during the years 1915 to 1922, inclusive (defendants' Exhibits 1 to 16, inclusive, in the Portneuf case—R. pp. 269 - 360, inclusive).

Defendants' Exhibits 10 to 15, inclusive (Portnef R. pp. 326 - 356) show assessments levied from

1920 to 1922, *all of which were subsequent to the dates of the quitclaim deeds.*

It is thus completely demonstrable that the status of the property involved in the Portneuf case is precisely identical with the property involved in this case, and so the trial court found from minute comparison of the two records (R. 163).

(D)—Identity of Questions Presented for Decision.

(1)—Merger.

One of the principal points urged by appellant on this appeal is that the foreclosure proceedings upon the settlers' water contracts by which part of the property involved was acquired through sheriff's deed, and the proceedings in lieu of foreclosure which resulted in the quitclaim deeds whereby other parcels of the property was acquired, operated to extinguish appellee's liens for construction charges; in other words, that a merger resulted; and that thereafter the property thus repossessed by appellee became subject to maintenance liens precisely as are any other lands and water rights of the project.

The trial court in the Portneuf case adopted that view. Appellant here has not been able to state its contentions more forcefully than was done in the following excerpt from the opinion of the trial court in the Portneuf case, 299 Fed., 338 (Portneuf pp. 440-441):

> "I find no provision expressly authorizing the taking of voluntary conveyances directly from the settler, but if, as contended by the plaintiffs, that authority is implied, and a conveyance so

taken has the status of a sheriff's deed on foreclosure, then in all cases where they have acquired the settler's rights, and have become the owners of both land and water, they hold such land and water in trust for the promoting company, subject to the lien of the trust deed. But however that may be, plainly the liens of the water contracts originally issued to the settlers, have been fully extinguished, and the statutory provision under consideration could not longer have any application. And, it may be added, together with the lien of the contract has gone the obligation of the settler to pay, for under the provision of the trust deed, above referred to, the trustees were authorized only to bid the full amount due upon the contracts, including interest and costs, and presumably when voluntary conveyances were taken the settlers' contracts were thus satisfied and terminated. So that if we were to take the view of the statute contended for by the plaintiffs, there would be no lien superior to the right of the operating company under its assessment sales, and there is nothing at all due from the settlers to the promoting company or the plaintiffs, and neither it nor they have any lien at all by virtue of the water contracts, either superior or inferior".

The trial court's reasoning quoted above was wholly rejected on appeal both by this court and the Supreme Court. Both appellate courts pointed out that the status of the property there being considered

was in precisely the same status as the property involved in this case. The Supreme Court said:

> "The project did not flourish. Some of the settlers having failed to make payment of installments due on the contracts of purchase, respondents acquired the land, water right and stock, in some cases by foreclosure and in others by quitclaim deeds * * *. The present suit was brought by respondents to foreclose the mortgage on the irrigation system and to foreclose any claims that the two companies might make to the land, water rights and stock acquired by respondents in the enforcement of their rights against the entrymen under the contracts of purchase * * *. The operating company as a defense set up by answer its ownership of some of the stock in controversy acquired under a lien alleged to be superior to that of respondents".

In the operating company's brief before the Supreme Court of the United States in the Portneuf case, it sought to uphold in language as follows the same theory of merger as is here advanced by appellant:

> "The water itself having been made appurtenant to land, and the land having been mortgaged as security to the construction company, the construction company held both the land and the water as security. Upon any default on the part of the individual contract holder, the construction company had the right to foreclose its

> mortgage on the water and the land. If it foreclosed its mortgage and obtained title to the water and the land through that means, then it stepped into the shoes of the individual settelr who had previously owned it. The water having been theretofore made appurtenant to land, then the stock in the operating company which represented that water remained subject to assessment regardless of who might own the stock. The fact that the construction company obtained title to the land and water through foreclosure proceedings against the original contract holder did not create any different situation than if the original contract holder had conveyed his land and water to some other individual".

What we shall here say in answer to appellant's contention that the enforcement of the Carey Act Water contracts resulted in a merger is substantially a paraphrase of the brief filed in this court by the appellant trustees for the bondholders in the Portneuf case.

Appellant's contention that the enforcement of the settlers' water contracts by the bondholders resulted in a merger is ineffectual because it leaves out of consideration the one essential and vital factor in the plan of Carey Act reclamation, which it is always necessary to keep in mind in determining the relative priority of the construction liens and the operating company liens. The factor is this:

Prior to the sale of the water right to the settler, the construction company concededly held, exempt

from assessment, the stock in the operating company which represented the water rights sold. When the construction company sold the water right to the settler, what did it sell? Property exempt from assessment for maintenance. To what then did its purchase money lien attach? Obviously the same property which it sold and in the same condition as at the time of sale—namely, property exempt from assessment. Its lien related back to the time of sale to the settler. When it or its bondholders enforced the purchase money lien which thus related back to the time of sale, it obtained the property on foreclosure in the same status as before the sale to the settler; that is, exempt from assessment until resold to some other settler. The appellant here still holds and always has held the water stock (R. 208). The contract of sale unless and until full payment was made was never anything other than a conditional sale. The Idaho supreme court so expressly holds.

> Bennett v. Twin Falls & C. Canal Co. 27 Ida. 652.

The contention that by the enforcement as against the settler of the Carey Act contract operated to extinguish any lien of the construction company or the bondholders contained and contains the inherent fallacy of assuming that a *merger* was effected by such enforcement when the simplest principles of equity are violated by such assumption.

It is a familiar principle in equity that a lien will not be considered as merged in a judgment or in a deed where the effect of such merger would be to

validate a junior claim, or otherwise to put the party against whom the merger is urged in a disadvantageous position with respect to a third party.

In the case of Factors & Traders Insurance Company v. Murphy, et al, 111 U. S., 738; 28 L. Ed., 582, the Supreme Court of the United States says:

> "Where an incumbrancer, by mortgage or otherwise, becomes the owner of the legal title or of the equity of redemption, the merger will not be held to take place if it be apparent that it was not the intention of the owner, or if, in the absence of any intention, said merger was against his manifest interest".

In the case of Wilson v. Linder, 21 Ida., 576, the Supreme Court of Idaho said:

> "It has been argued by counsel for respondents that the tax certificates * * * and all right acquired under them, was immediately merged in the deed executed by Jesse Wilson * * *. This contention is made upon the principle of law that where legal and equitable titles both meet in the same person, the equitable merges in the legal title.
>
> "This is true as a general proposition but with many exceptions and qualifications, one of which is that there will be no merger where it will prove inequitable *or to the disadvantage of the person who is honestly seeking to protect his right*". (Emphasis supplie).

Appellant's brief cites several authorities to the effect that *in law* a merger always takes place when a greater estate and a less meet in the same person in one and the same right without any intermediate estate. In each instance, the quotation given is partial and misleading. Almost invariably the very same section of the text from which plaintiff quotes contains such expressions as the following:

> "Where a mortgage encumbrancer becomes the owner of the legal title or of the equity of redemption, a merger will not be held to take place if it be apparent that it was not the intention of the owner or if in the absence of any intention the merger would be against his manifest interest".
>
> Jones on Mortgages, 8th Edition, Section 1080.
>
> "If no intention has been manifested, equity will consider the encumbrance as subsisting or extinguished as may be most conducive to the interests of the party".
>
> Idem.
>
> "A merger will not be held to result wherever a denial of a merger is necessary to protect the interests of the mortgagee, the presumption being, in the absence of proof to the contrary, that he intended what would best accord with his interests. * * * If there is no evidence of intention, and it appears to be a matter of entire indifference to the mortgage whether there is a

merger or not, then equity will follow the rule at law and a merger will be held to have taken place".

41 C. J., Section 874.

Authorities to the above effect could be multiplied indefinitely.

The same general equitable principles which deny the existence of a merger for the benefit of a third party did in the Portneuf case and do here deny the doctrine of merger where its assertion creates *vulnerability* to a subsequent lien of a third party.

It was not the intent of the federal or the state laws or the intent of the parties expressed in the pertinent contracts and other documents relating to the subject that at any time the interest in the irrigation system of the construction company and its bondholders, represented by the cost of such construction and for which it had initially a paramount lien, should be subject to maintenance assessments of the operating company. Before the sale to the settler, such interest was not subject to assessment by the plain terms of the state contracts. After sale to the settler it was not subject to assessment. The interest of the settler evidenced by his payments was subject to assessment, and that alone.

The situation of the construction company and its bondholders with respect to the property was a unique and distinctive situation. Initially it built the project and owned it, but, as stated above, it owned it only in a trustee capacity. It had bound itself to sell water rights to anyone who might enter the

Carey Act land. It could not pick its risks. Any citizen of the United States qualified to enter Carey Act land, no matter how impecunious or how inexperienced in farming, could apply for the purchase of a water right. The construction company was bound to enter into the purchase contract. In case of default, its only remedy was by foreclosure. Unless it foreclosed its claim against the settler for the purchase price, it became barred by the statute of limitations. Meridian v. Milner, 47 Ida., 439; 276 Pac., 313. It was forced to foreclose; it had no alternative or election. To protect its paramount lien, it or its bondholders was obliged to bid in the property. One of the plainest of the "implications to be found in the general nature and purpose of the (Carey Act) plan itself" as referred to in the decision of the Supreme Court of the United States in the Portneuf case is that after the uncompleted sale to the original settler resulted in foreclosure, the construction company or its bondholders held the repossessed property in the same situation in which it held it prior to the unsuccessful sale; namely, exempt from assessment.

This is true not only under the general principles of merger, but because of the nature of the property sold and the nature of the settler's purchase contract evidencing the lien.

We have for brevity referred to the settler's purchase contracts as effecting a "sale." But the time nature of the contract whereby a Carey Act construction company sells a water right to a settler is elucidated by the Supreme Court of Idaho in the case of

Bennett v. Twin Falls North Side Land and Water Company, 27 Ida., 652. The court there said:

> "It is evident from the provisions of the settlers' contract that the purpose was not to make an *absolute conveyance* of the water right * * *. *The state contract provides that pending the fulfillment of the contract between the entryman and the Land & Water Company, the entryman may have the right to the possession and enjoyment of the water right* * * * nor can it reasonably be urged that the title to the water right *passes to the purchaser upon the execution of his contract* with the Land & Water Company, for in the present case, as well as practically every Carey Act project, there was no water right in existence at the time of the execution of water right contracts. There is nothing in the contract to vest the water right in the entryman *unless he makes payment for the same* * * *". (Emphasis ours).

The above case dealt with the identical Carey Act project and the identical state contract involved in this appeal (Par 8 State Contract; R. 183).

The settler's contract created *as against him* what is analogeous to purchase money mortgage. Water rights in Idaho are real property or real estate.

> Section 61-405, Idaho Code Annotated,
> Nelson v. Proctor, 19 Ida., 727,
> Clark v. Paddock, 24 Ida., 142,
> Bennett v. Twin Falls, etc. Co., supra.

The construction company's lien *as against the settler* is governed by the equitable principles generally applicable to such purchase money mortgages.

> "A mortgage given for the unpaid balance of purchase money on a sale of land simultaneously with a deed of the same and as part of the same transaction is entitled to the highest consideration of a court of equity and takes precedence of prior judgments and all other existing and subsequent claims and liens of every kind against the mortgagor to the extent of the land sold."
>
> 41 C. J., 528, Sec. 470.
>
> "A purchase money mortgage is what the term implies and is predicated on the theory that on the simultaneous execution of the deed and mortgage the title to the land does not for a single moment rest in the purchaser, but merely passes through his hands and without stopping rests in the mortgagee. It follows, therefore, that no lien of any character can attach to the title of the mortgagee".
>
> Keith v. Cropper, 196 Iowa, 1179.

This is the doctrine of instantaneous seizin. The title does not stop beneficially in the purchaser, but rests always in the mortgagee. Dower rights and homestead rights do not attack. Liens against the purchaser prior in time even to the purchase money mortgage are cut off.

> Kneen v. Halin, 6 Ida., 621.

In accordance with the foregoing equitable doctrine, the Carey Act settler who executed a water contract, made default in his payments, and was eliminated by foreclosure was a mere shadow. The beneficial interest in the project sold to him remained always in the construction company and its bondholders to the extent of the unpaid portion of the contract price of the water right. The Supreme Court of Idaho in the Bennett case, supra (27 Ida. at p. 655) referred to the sale to the settler as a *conditional* sale. To be sure, such equity as the settler possessed during his tenure was always subject to assessment by the operating company, but no interet of the construction company or its bondholders representing the cost of reclaiming the land can ever be subject to assessment until the purchase price of the water right as fixed by the state contract is paid.

It is urged in appellant's brief herein (p. 63, et seq.) that the settler's water purchase contract had no resemblance or analogy to a purchase money mortgage because the construction company never had anything to sell; that it was merely a construction company, holding, constructing, and having the irrigation works and water rights in a trustee capacity.

The contention that the relation of the construction company to the project is that of a trustee is wholly sound. But the very purpose of the trust and its functions under the trust was to enable it to make sales of water rights to settlers. It requires some temerity on the part of appellant to contend that the

construction company never had anything to sell, in the face of the most basic provisions of the state contracts (Exhibits 1, 2, and 3; R. 182,et seq.) reiterating the paramount obligation of the construction company "to sell water rights * * * without preference or partiality other than that based upon priority of application". Aside from those provisions of the state contract, requiring the construction company to build the system, practically the entire contract concerns itself *only* with the terms and conditions of sales to settlers. Yet notwithstanding appellant urges here that the construction company never had anything to sell!

The very numerous citations set out on pages 64 and 65 of appellant's brief, and also those listed on page 34 of its brief, are conclusive in support of *appellee's* fundamental position, which is well stated in appellant's brief (p. 63):

> "* * * that it has been held and is now firmly settled that appellee was only a construction company; that the water appropriated * * * was not appellee's private property but it was given a water permit in trust for the future settlers; that it served only as a conduit for transferring rights to the use of water from the state to the settler * * * appellee was not allowed to make any profit through the sale of water * * *".

We agree. The sole purpose of the trust was the making of sales to settlers, and the only right that appellee is seeking in this suit and the only relief

granted to it by the court below is the right to make such sales without profit; but free in the meantime from confiscation of the property through the mechanism of appellant's maintenance assessments.

(2)—Distinction as to Form of Assessments in Portneuf Case and Here.

In the Portneuf case, the maintenance liens asserted by the operating company were in form assessments levied upon the capital stock of the operating company, while here the maintenance liens are based upon proceedings under Chapter 19, Title 41, Idaho Code Annotated (Sections 41-1901-41-1910, I. C. A.). Appellant urges that this constitutes a distinction between the two cases.

This is a distinction wholly without a difference. Indeed the Supreme Court in the Portneuf case comments upon this alternative method of assessment that might have been pursued by the Portneuf operating company and expressly construed the statutes under which the defendant here relies for its alleged liens.

Sections 41-1901 to 41-1910, Idaho Code Annotated, were formerly Chapter 138 of the Compiled Statutes of Idaho (Sections 3040-3049, inclusive).

The Supreme Court of the United States in the Portneuf case (71 L. Ed., at page 1270) said:

> "It is significant also that chap. 138 of the Compiled Statutes of Idaho, which provides for the regulation of the Carey Act operating companies, contains specific provisions for establishing maintenance liens on Carey Act lands to

> which the water rights are appurtenant, by filing a notice of lien with the county recorder (Secs. 3040, 3042), a procedure which does not seem to have been followed here. There are provisions for foreclosure and sale of the land with appurtenant water right. Secs. 3045, 3046. Section 3040 describes the maintenance lien as a 'first and prior lien', but it is expressly provided (Sec. 3049) that this article shall not affect 'any other lien or right of lien given by the laws of this state, or otherwise, '*thus in terms giving the lien authorized by Sec. 3019 priority*". (Emphasis ours).

From the language above quoted it will be seen that the Supreme Court construed the sections of the statute upon which the appellant relies for the priority of its maintenance liens as "*thus in terms giving the lien authorized by Sec. 3019 priority*".

Section 3019, Compiled Statutes, referred to in the Supreme Court's opinion is now Section 41-1726, Idaho Code Annotated, and reads as follows:

> "Any person, company or association, furnishing water for any tract of land, shall have a first and prior lien on said water right and land upon which said water is used, for all deferred payments for said water right; said lien to be in all respects prior to any and all other liens created or attempted to be created by the owner and possessor of said land; said lien to remain in full force and effect until the last

deferred payment for the water right is fully paid and satisfied according to the terms of the contract under which said water right was acquired."

It is apparent from the foregoing that while the maintenance liens asserted in the Portneuf case were based upon stock assessments concerning which there was no specific language in the statutes defining their relative priority with respect to Carey Act construction company liens, the Supreme Court of the United States, in determining their effect, pointed out that the alternative method of assessment which might have been pursued (and which was pursued by appellant in the case at bar) was based upon statutes which "in terms" recognized the priority of the Carey Act construction company lien. Clearly, in view of the above, no comfort can be derived by the appellant here from the fact that the maintenance liens asserted are based upon proceedings under Chapter 19, Title 41, Idaho Code Annotated, instead of upon corporate stock assessments.

It is clearly apparent that the Supreme Court in the Portneuf case was considering *the substance and effect* of maintenance assessments, whatever might be their *form or method.*

(3)—Time When Construction Lien Attached.

The lien for construction costs came into existence by operation of law upon compliance by the construction company with the terms of the law. At the time the state contracts were executed, the law (now Section 41-1726, Idaho Code Annotated) declared:

> "Any * * * company * * * furnishing water for any tract of land shall have the first and prior lien on said water right and land upon which said water is used for all deferred payments for said water right".

Therefore, when the construction company made water available for any tract of land, its construction lien attached; the lien antedated even the settler's contract, although the amount of the settler's purchase price fixed the amount of lien. As was said by the Idaho Supreme Court in Columbia Trust Company v. Eikelberger, 42 Ida., 90 ,at page 105):

> "Since the settler's contract does not itself create the lien, the right thereto, mentioned in the first state contract, must be found in the statutes. The federal statute authorizes the state to create a lien against the land. Under the state law (C. S., Sec. 3019) a lien is created against both the land and the water right, but it is not stated therein when such lien attaches, and our attention has not been called to any provisions of the first state contract in that connection. In Childs v. Neitzel, 26 Ida., 116-140, on rehearing, it was said that the liens of water contracts do not attach until the water has been made permanently available to the land. That statement of the law was amplified in Idaho Irr. Co. v. Pew, 2 6Ida. 272 * * *".

By the plain terms of the state contracts (Para-

graph 9-R. 185) and of the plaintiff's by-laws (Exhibit 8, R. 191) the construction company's interest in the irrigation system was not subject to assessment until the stock representing such interest was sold to settlers. If the water rights here involved had never been sold to settlers, they would concededly not be subject to assessment, even up to the present time or indeed for an indefinite period hereafter.

After sale of the water rights to settlers, the shares became subject to assessment; *but only to the extent of the settler's interest therein.* This is clear, beyond any doubt, from plaintiff's own by-laws (Exhibit B —Article 10, Section 5) wherein it is recited that

> "all assessments * * * must be paid by the purchaser or owner of the stock *and not by the Twin Falls North Side Land & Water Company, its successors or assigns*".

If the operating company levied assessments upon the property while under contract of sale to settlers, it could under the law have foreclosed its maintenance lien and divested the settler of his rights under the contract; but if the operating company had purchased the property upon such foreclosure, it would have continued to hold the property subject to the prior and paramount construction lien; so would any other purchaser at such foreclosure sale for delinquent assessments.

(4)—Appellee's Rights Under Trust Deed.

In the Portneuf case, the United States Supreme Court stated that "the case was disposed of below on

the theory that the trustees (for the bondholders) as against the operating company, so far as the water rights and stock were concerned, stood in the position of the construction company".

It is reasonably apparent, however, that neither this court nor the Supreme Court wholly concurred with the view of the lower court. The rights of the bondholders were held to have attached under a mortgage on the entire irrigation works, given and recorded when construction work on the project was barely begun, and long before the system was turned over to the operating company. The same situation obtains here. Indeed it clearly appears that the mortgage (or trust deed) here involved was executed November 1, 1907, and long prior even to the state contract of January 2, 1909. No water rights for the land here involved had been sold when the trust deed was given.

Excepting only to the extent of rights acquired by actual settlers through payments on the purchase price of water rights (see Section 41-815, I. C. A.), the trust deed was in all respects an ordinary mortgage on the entire corpus of the property. The water rights sold to settlers and the proportionate interest in the system evidenced thereby were released from th trust deed *only to the extent of such payments* (Sec. 41-815, I. C. A.). The water contracts of the settlers were initially held by the trustee for the bondholders in pledge in connection with the trust deed as security for the bonds. After the enforcement of the settlers' water contracts, the bondholders held

the property thus acquired (being the property involved in this suit) in substituted pledge precisely as previously the bondholders, through their trustees or other agents, had held the settlers' contracts.

As we have heretofore stated, the mere fact that the bondholders have taken over the project by voluntary conveyances and instruments instead of through foreclosure of the trust deed does not affect their rights. No merger will be implied to their disadvantage, or to the benefit of the secondary maintenance liens of appellant.

When the trust deed was given, the construction company certainly had the same right to mortgage the property as appellant would have today; and could it for a moment be contended that if appellant today, as present owner, gave a mortgage on the entire irrigation system and subsequently levied annual assessments pursuant to the identical statutes under which it her claims, it could by foreclosure sales upon such assessments convey title to any purchaser under such assessment foreclosure sales free of the lien of its own prior and paramount general mortgage? Most certainly it could not; nor can it do the same thing here, because its maintenance liens subsequently levied are secondary to the prior general trust deed on the project given by the construction company in 1907.

(5)—State Cases Upon Which Appellant Relies As to Priority of Its Liens.

(A)—The Werner Case.

Just as in the Portneuf case, appellant claims that

the decision of the Supreme Court of Idaho in Continental, etc. Bank v. Werner, 36 Ida., 602; 215 Pac. 458, has construed Section 41-1726, under which appellee claims its rights (formerly C. S. Section 3019) in such manner as to nullify the priority of appellee's construction lien.

The same contention was made in the Portneuf case and was cited by the trial court as sustaining the operating company's contention (Portneuf R. 437). The Werner case was considered by this court on appeal of the Portneuf case (5 Fed. (2), 895) as having so little application to the question here involved that it was not mentioned in the opinion. It was referred to in the opinion of the U. S. Supreme Court merely as sustaining the proposition that "it is an implied term of every lien statute that the lien authorized is subordinate to liens for taxes" (71 L. Ed., at page 1270); and such was clearly the only point decided by the state supreme court in the Werner case.

The question in the Werner case was solely whether the Carey Act construction lien was a lien prior to that of general state and county taxes. Since the laws making all property subject to taxes for the expenses of government long antedated the Carey Act construction lien, the Werner case very properly held that the priority accorded the construction lien was subject to the power of the sovereign to tax. That was the sole question decided.

In discussing the Carey Act lien statute, the Idaho Supreme Court in the Werner case pointed out in

support of its conclusion as to the priority of taxes that under one of the clauses of the lien statute "the only lien to which the lien of a Carey Act contract is superior are those created or attempted to be created by the owner and possessor of the land". This is urged by appellant as supporting the position that the construction lien is subordinate to every sort of lien (including maintenance liens) except those imposed by the voluntary act of the Carey Act entryman. In commenting upon this contention, the Supreme Court of the United States in the Portneuf case following this court, remarked:

> "If the meaning here contended for were given to the statute, liens for the unpaid purchase price would be subject to subsequent materialmen's and mechanics' liens and those of attachment and levy of execution. The statute obviously could not be so interpreted without thwarting its plain purpose and destroying its effective operation".

The Werner case is wholly inapplicable to the question of the relative priority of liens asserted by private parties. It in no manner decides the controversy here presented.

Mere dicta, not relevant to the decision of the actual controversy before the court, is not binding either on the court that uttered it or on other courts.

> Carroll v. Carroll, 16 How., 275; 14 L. Ed., 936;
>
> Matz v. Chicago, and A. R. Co. (CCA8th), 85 Fed., 180;

Leeper Co. v. Neely Co. (CCA 6th), 293 Fed., 967; Certiorari denied, 264 U. S., 586; 68 L. Ed., 863;
Judith Basin Dist. v. Malott (C. C. A. 9th) 73 Fed. (2d) 142.

Indeed, the Supreme Court of Idaho has been most emphatic in enunciating the same well-known rule. In Bashore v. Adolph, 41 Ida., 84, the court said:

> "Opinions must be considered and construed in the light of the rule that they are authoritative only on the facts on which they are founded. General expressions must be taken in connection with the case in which those expressions are used. There is a pronounced line of demarkation between what is *said* in an opinion and what is *decided* by it".

To the same effect:

Stark v. McLaughlin, 45 Ida., 112;
Eldridge v. Black Canyon Irrigation District, 55 Ida., 443.

(B)—Cases Construing Section 41-1901, I. C. A.

Appellant relies upon the language of Section 41-1901, I. C. A., as establishing the priority of its liens over appellee's lien, in that such section declares that the maintenance lien shall be "a first and prior lien except as to the lien of taxes upon the land to which said water and water rights are appurtenant".

Appellant argues that in the case of Carlson-Lusk v. Kammann, 39 Ida., 634; 229 Pac., 85, the Idaho Supreme Court declared such priority in the precise

language of the statute; therefore, that the Supreme Court of Idaho in the above decision has in effect settled the controversy in this case by announcing the priority of appellant's liens.

An examination of the Carlson-Lusk case clearly negatives that it has any such effect. In the Carlson-Lusk case, the plaintiff was foreclosing a mortgage upon property which the North Side Canal Company, Limited, also claimed a maintenance lien. The mortgage there involved was recorded in 1919; the maintenance assessment was for the year 1920. The canal company by reason of its maintenance lien was made a party defendant in the mortgage foreclosure suit; and by cross-complaint it sought the foreclosure of its maintenance lien. The trial court held the canal company's lien prior to the mortgage. On appeal the decision was reversed and the prior mortgage held to be the prior lien. In the reversal, it was necessary for the Supreme Court to go no further than to point out that since the evidence failed to show that the Canal Company was wholly controlled by its stockholders, the section of the statutes it invoked was imapplicable to it.

Since the decision was rested on the above obvious point, it was quite unnecessary for the court to consider in connection with the priority of the maintenance lien asserted under Section 41-1901, that other section (41-1910, I. C. A.) which is a part of the same chapter of the code as section 41-1901 and provides:

"This chapter shall not be held to affect * * *

any other lien or right of lien given by the laws of this state, or otherwise".

As pointed out above, the Supreme Court of the United States in the Portneuf case construed the above quoted statute as "thus in terms giving the lien authorized by Section 3019 (now Section 41-1726, Idaho Code Annotated) priority".

Moreover, in the Carlson-Lusk case it is said:

> "*Conceding for the purposes of this case the validity of the statute we have cited,* the question of the priority of the canal company's lien * * * depends on whether the North Side Canal Company, Limited, is actually controlled by the water users * * *. For the reason stated, it is unnecessary and would be futile to consider in this case the constitutional questions raised by the appellants as to the statutes we have cited". (Emphasis ours).

That the Supreme Court of the United States in the Portneuf case was clearly correct in construing Section 41-1910 as "thus in terms" giving the construction lien priority is demonstrable. Section 14-1901 and Section 41-1910 were both originally enacted in the year 1913 (Laws 1913, 464). The statute as originally enacted applied solely to Carey Act operating companies. In 1925 the law was extended to mutual co-operative irrigation companies generally (L. 1925, 154).

In expressly providing by the original enactment that the maintenance lien should not affect "any

other lien or *right of lien* given by the laws of the state *or otherwise*", the legislature naturally had in mind other liens pertaining peculiarly to Carey Act projects—namely, the construction liens—imposed by the combined sanction and authority of the federal Carey Act and the state legislation accepting it. Hence the Expression "given by the laws of this state or otherwise". The legislature intended to protect the priority of these construction liens. Any other intent on the part of the legislature would have approached dishonesty; and an interpretation of the statute ascribing to the legislature the intent to displace previously paramount Carey Act construction liens would render the legislation repugnant, we think, both to the federal Carey Act and to the federal and state constitutions.

While the federal Carey Act delegated to the state authority to *create* the Carey Act construction lien, the act of Congress expressely declared that

> "*such lien when created shall be valid on and and against the separate legal subdivisions of land reclaimed for the actual cost and necessary expenses of reclamation and reasonable interest thereon*".

In other words, the validity of such lien after its creation is expressly asserted by the congressional act itself. Congress did more than merely authorize the state to create the construction lien. It attached to the lien certain mandatory provisions as to its nature after its creation. What did Congress mean

by using the term "shall be valid"? What is meant by the erm "valid" and what is a valid lien?

> "The term 'valid' means in law having legal strength, force and effect, or incapable of being rightfully overthrown or set aside".
>
> Emerson v. Knapp, 75 Mo. Appeals, 92, 97,
> U. S. v. McCutcheon, 234 U. S., 702.

> "To say that a mortgage shall be valid means, of course, valid as a mortgage; that is to say, a lien on specific property with the ordinary incidents of such lien, one of which is *priority* as to that particular property over all other debts of the mortgagor *which have not prior to that time ripened into a lien*". (Emphasis ours).
>
> King v. Fraser, 23 S. C., a page 567.
>
> "The word 'valid' means 'having legal strength or force * * * incapable of being rightfully overthrown or set aside".
>
> Edwards v. O'Neal (Tex.), 28 S. W. (2), 569, 572.

We believe, therefore, that Congress by its language expressed the intent that whatever lien for construction cost was created by the state legislature should thereafter have validity, force, and effect and be incapable of being nullified or impaired by the creation of other liens in favor of other private parties.

Therefore after a construction company has contracted with the state in view of such prior lien, and expended large sums of money in the construction of

irrigation works in reliance thereon, the legislature could not, even if it so desired, destroy the validity and priority which the act of Congress manifestly intended that these liens after their creation should thereafter possess. The construction of Section 14-1901 contended for by appellant would constitute that impairment of the obligations of a contract which is forbidden both by Section 10, Article 1 of the federal Constitution and also by Section 16, Article 1, of the Idaho Constitution, and would also impair vested rights.

> "A statutory lien cannot be given priority over a lien existing before the enactment of the statute creating it".
>
> 37 C. J., page 329, Sec. 41,
> 17 R. C. L., page 611, Sec. 21,
> Toledo, etc. v. Hamilton, 134 U. S., 269;
> 12 Am. Jur., page 354, Sec. 671, Title "Constitutional Law",
> Yeatman v. King, 51 N. W., 721,
> National Bank of Commerce v. Jones (Okla.), 91 Pac., 191,
> Baker v. Tulsa Building & Loan Ass'n. (Okla.), 66 Pac. (2d), at page 49,
> Barnitz v. Beverly, 163 U. S., 118; 41 L. Ed., 93.

We perhaps need pursue this aspect of the case no further. The United States Supreme Court in the Portneuf case has expressly declared that Section 41-1910, I. C. A., in express terms exempts Carey Act

construction liens from the priority claimed to be accorded to appellant's liens under Section 14-1901, I. C. A. There is certainly no contrary pronouncement by the Idaho Supreme Court, which has never construed Section 41-1910. Only in the event that this court should depart from the previous binding construction put upon the statute by the United States Supreme Court in the Portneuf case would it be necessary to consider the act of Congress and the constitutional provisions just above referred to. If the construction of the United States Supreme Court is followed, no conflict with the federal law or constitutional provisions could be claimed to exist.

Since Judge Cavanah's decision in this case, one of the cases involving appellant's 1932 maintenance liens has been tried in the state district court. It is very significant that the trial judge, after painstaking scrutiny of the state supreme court cases upon which appellant relies, has come to the conclusion that neither the Werner case nor the Carlson-Lusk case above discussed, nor any other state case, bears upon the main issue here presented for decision.

In an able opinion, Judge Guy Stevens, presiding in the District Court of Jerome County, Idaho, has just a few days ago, with all the arguments before him that have been set forth in appellant's brief here, come to conclusions in all respects identical with those announced by Judge Cavanah. We are setting forth as an appendix to this brief the full text of Judge Stevens' opinion. It will be observed that he not only follows the construction put by this court

and the Supreme Court of the United States in the Portneuf case upon the statutes and contracts governing this case, but he has concluded, after minute examination of the record in the Portneuf case, that the status of the parties, the status of the property involved, and the issues presented in the Portneuf case were identical with the case before him. Also on reason and principle he has thoroughly endorsed the conclusions of this court, the Supreme Court of the United States, and the decision of Judge Cavanah on all the controversies presented on this appeal.

Particularly devastating to appellant's contentions on this appeal is the following language from Juge Stevens' opinion:

> "Suppose that the Construction Company sold a water right to an Entryman and that Entryman failed to make the necessary improvements on the land for which the water right was sold, and therefore never acquired title to the land, and that the Construction Company, because of default by the purchaser, foreclosed its lien upon the water. Can it be said that the Construction Company could resell such water right in violation of the State contracts? I think not. The water right would then be subject to the lien of the trust deed, and the situation would be the same as if the water right had never been sold and would be exempt from assessments for maintenance and operation. The Construction Company would still be obliged to sell the water right to any other Entryman applying therefor.

I am of the opinion that where a Carey Act contract has been foreclosed because of default in the payment of the purchase price of the water, or where for that reason a deed has been executed conveying the property to the Construction Company, as was done in this case, that the water right and land is exempt from assessments for maintenance and operation the same as if the contract had never been made and the water stock issued. The stock was not subject to assessment before it was issued, and if in case of default, the Construction Company takes the necessary steps to preserve its security and thereby subjects the security to liens for assessments, operation, attachment, etc., then it would destroy the value of its security by undertaking to protect it. This, to my mind would be contrary to the clear intent and purpose of the Carey Act laws and contracts. When title to the lands and water rights involved was acquired by the Construction Company or its successor or assigns the trust deed was in existence, and was true when their assessments were levied by the Operating Company, and such lands and water rights were subject to the lien of the trust deed, and the lien of the bondholders who furnished the money for the construction of the project would be a prior and paramount lien to that of the Operating Company, even though they had a legal right to levy assessments for maintenance and operation under those circumstances.

When title to the land and water rights was acquired by foreclosure or by the acceptance of deeds the grantee acquired only a limited ownership and was still subject to the obligation of the state contract with respect thereto.

"Upon a consideration of the facts and record in the Portneuf-Marsh Case, I am convinced that the facts in the instant case are essentially the same, and that the decision in that case is controlling in this case. I have considered the questions of merger and estoppel raised by the plaintiff and they appear to me to be without merit."

III

COLLATERAL ISSUES

(A)—Appellee Is Not Estopped From Contesting Validity of Appellant's Assessments.

Appellant set up in its answer (fifth affirmative defense, R. 54-58) that appellee is estopped to deny the priority of appellant's maintenance liens. The court below found against this defense both on the facts and the law (Findings XX, R. 107; Op., R. 164). Appellant assigns the court's conclusions as error (Specifications 5, 7, and 12).

The alleged estoppel is based upon two grounds: First, that plaintiff or its agents paid maintenance assessments upon the properties up to and including the year 1931. Secondly, that Mr. R. E. Shepherd, an employee of the bondholders' committee and an officer of the construction company and of the investment company, *but who was at the same time*

general manager of the appellant canal company, assisted in preparing the budget of expenditures upon which the maintenance assessments here involved were made, and recommended and acquiesced in the expenditures which resulted in the alleged improvements of the irrigation system. We think no element of estoppel is present on either ground.

To constitute an estoppel on any basis, it must be shown that the party claiming the estoppel has been put in a disadvantageous position and acted to his disadvantage in a manner in which he would not have acted except for the other party's misleading statements or conduct. In the case at bar, there is not a single syllable of testimony in the record that defendant would have acted any differently than it did in any respect regarding the 1935-1937 assessments here in controversy if the circumstances alleged to constitute the estoppel had not occurred. No witness for defendant testified that the company made or refrained from making any expenditure or fixed the amount of the assessment differently than it would otherwise have done, in reliance upon any act or conduct of anybody connected with appellee. The trial court expressly found (R. 108) "that defendant did not by reason of any action of plaintiff alter its position to its disadvantage". There is no testimony in the record to controvert this finding, and appellant does not claim there is any. In these circumstances, there is no basis for estoppel.

> "In order to apply the principle of equitable estoppel it is essential that the party claiming to

have been influenced by the conduct or declarations of another to his injury was himself ignorant of the facts in question, and also without any convenient and available means of acquiring such knowledge. Where the facts are known to both parties or both have the same facilities for ascertaining the truth, there can be no estoppel".

Cahoon v. Seger, 31 Ida., 101;
Sullivan v. Mabey, 45 Ida., 595.

In Johansen v. Looney, 31 Ida., 754, the court laid down the following rule:

"The defense of estoppel is not available to a holder of title as against one contesting his right, where such title holder was at all times in possession of full knowledge of the nature of his title and the facts relating to the manner of its acquisition".

"Matters of equal knowledge between parties cannot become the basis of an equitable estoppel in favor of one against the other".

National Surety Company v. Craig, 220 Pac., 943.

"Estoppel may not be employed to secure advantage or to fortify gain, since its office is to protect from loss consequent on change of position in reliance on representation or other inducement".

Midwest Lumber Co. v. Brinkmeyer, 264 Pac., 17, 19.

In Brant v. Virginia Coal & Iron Company, 93 U. S., 326; 23 L. Ed., 927, it is said:

> "Where the condition of the title is known to both parties, or both hove the same means of ascertaining the truth, there can be no estoppel".

Appellant claims that the trial court erred in its finding that in all those respects in which R. E. Shepherd was acting in regard to estimates for assessments, recommendations for making improvements in the irrigation system, and like matters, concerning which appellant relies in its defense of estoppel, Mr. Shepherd was acting as an agent and officer of defendant and on its behalf and not as agent or officer or on behalf of plaintiff or the said bondholders or any of their said agencies (R. 108).

But the finding complained of is in almost the exact language of appellant's own witness, Harvey W. Hurlebaus, its secretary-treasurer, who stated:

> "As President and as General Manager of the *canal company* he (Mr. Shepherd) attended regular meetings of the board of directors and the regular annual meetings of the stockholders of the company, as well as any special meetings which were called from time to time. *As general manager of the Canal Company* Mr. Shepherd made recommendations to the directors and to the stockholders concerning the improvement of the system" (R. 225).

It could hardly have been otherwise. Naturally,

as general manager of appellant company, it was within the scope of Mr. Shepherd's duties to participate in the esimate of the amount of money that would be required to operate defendant's system, to make up its budgets, and to be present at the meetings at which the amount of the annual assessments were discussed and the assessments levied. He had not been since 1920 (R. 243) a member of the board of directors of the appellant company; and its board if directors presumably made the actual levy of assessments here involved—if any such assessments were ever legally levied.

It is true that Mr. Shepherd was while acting as general manager of appellant company at the same time an employee of the bondholders' committee and also manager of the Land and Water Company and of the Investment Company prior to their merger. In these circumstances, the law does not imply any authority on the part of an officer to waive any rights of either corporation. As stated in 14-A C. J., 365:

> "But one corporation is not liable for the acts of such officers done in the discharge of their duties toward the other corporation."

Appellant could not safely do otherwise than spread the assessments ratably over all the lands of the project and take every step necessary to protect its rights until the controverted question of appellee's liability was ultimately determined. Moreover, if at any time tracts of appellee's repossessed land were sold to other settlers who thereupon be-

gan using water, they would immediately again become subject to maintenance charges. In these circumstances, quite obviously tracts of appellee's repossessed properties which at the time the assessment was levied were not subject to assessment might become again subject to assessment (to the extent of the new settlers' interest) during the year for which the assessment was made. The fact that Mr. Shepherd, serving in a dual capacity as an employee of both companies did nothing to waive any right of appellant, certainly should not be advanced as an argument that he thereby waived any rights of appellee.

If Mr. Shepherd, serving in the dual capacity, had vehemently asserted that the assessments were invalid as against appellee's property, it would not have been binding upon appellant's legal right here. The law would not be able to determine in behalf of whose interests Mr. Shepherd might be speaking. Conversely, in the same circumstances, even if Mr. Shepherd were shown by the evidence to have taken the position that appellee's lands *were* liable for the assessments, the law would not be able to determine that his position was not dictated by his interest as general manager of the appellant company. There is no testimony in the record that Mr. Shepherd or anyone else on behalf of plaintiff ever promised or agreed to pay the controverted assessments, or any of them; or, on the other hand, that he asserted their illegality. He took no position in the matter. Mr. Shepherd acted with exemplary propriety while act-

ing in such dual capacity, and nothing he did or omitted to do affords any basis of estoppel for either.

The assessments here in controversy are those for the years 1935-1937, inclusive. The evidence discloses that appellee had paid no assessments on any of its lands since the year 1931. Any action taken by appellant with respect to the assessments here involved must inevitably have been taken in the light of the clear knowledge that for a period of at least three to five years, appellee had been consistently declining to pay any assessments upon any of its property. In these circumstances, it can hardly be claimed by appellant that with respect to the assessments here involved or with respect to any expenditures of money derived from said assessments it was in any manner misled or projudiced.

It is claimed by appellant that by the payment of certain maintenance assessments upon appellee's lands up to the year 1931, it has waived its legal rights to contest here the priority of the maintenance assessments involved. The law is clearly to the contrary.

> The essence of waiver is estoppel, and when there is no estoppel there is no waiver.
>
> 67 C. J., page 294;
> Globe Mutual Life Ins. Co. v. Wolff, 95 U. S., 326; 24 L. Ed., 387, at page 389;
> Williams v. Neeley (CCA 8th), 134 Fed. 1.

In Hawkins v. Smith, 35 Ida., 349, the court, in discussing waiver (p. 353), and after declaring that

it is the voluntary abandonment or relinquishment by a party of some right or advantage, said:

> "But in such a case it must appear that the adversary party has acted in reliance upon such waiver and altered his position so that he will be prejudiced."

In Gibson v. Iowa Legion of Honor (Ia.), 159 N. W., 639, it is stated in Section 21 of the syllabus:

> "A waiver, created by payment of illegal assessments, cannot estop the assured from refusing to continue to pay the illegal exactions".

In the opinion at page 645, the court uses the following language:

> "And if it were true payments were made which could not legally be exacted, the waiver thus created, if any, cannot operate to estop one from refusing to continue to pay such illegal exactions".

In O'Malley v. Wagner (Ky.), 76 S. W., 356, it is stated in the syllabus:

> "A mere payment by one of part of the debt for which he is not legally bound, in not prejudicing anyone, does not estop him to deny liability for the balance".

In the body of the case, the court said:

> "We do not understand that, because a person pays a part of a debt for which he is not legally

bound, he thereby becomes bound to pay the balance".

In Juett v. Cincinnati Railroad Company (Ky.), 53 S. W. (2d), 551, the court said:

"One is not estopped to deny liability by having made payments not legally due".

To the same effect:

Williams v. Harrison (Ind.), 123 N. E. 245;
Quaschneck v. Blodgett, 156 N. W., 216.

"A waiver, like a gift, can only operate in praesenti. When intended to operate it futuro, it is at most only an agreement to waive, which, it would seem, must, like all other agreements have a consideration".

Gardner v. Clark, 21 N. Y., 399.

The above language was quoted with approval in Johnson v. Nevada Packard Mines Company, 272 Fed., 291, at page 305.

Also to substantially the same effect is Walsh v. Howard & Childs, 113 N. Y. Supp., 499, 502.

Rice v. Fidelity & Deposit Company (C. C. A. 8th), 103 Fed., 427, 435.

In appellant's brief (page 70), quotation is made from 21 C. J., Section 221, page 1216, concerning "Acquiescence". The following section (No. 222) of the same work, page 1217, points out the *true qualification* of the rule set out in appellant's quotation:

"It is also essential that the party claiming

> the estoppel should be misled by the acquiescence of the party against whom the estoppel is claimed, that he should be entitled to rely thereon, and that he should be induced to change his position by reason thereof; and the acts of acquiescence must be such as to prejudice the party claiming the estoppel".

As stated above, there is not a syllable of evidence in the record here to contradict the trial court's finding and conclusion to the effect that appellant neither relied upon nor was injured by any alleged acts or conduct of appellee in the way of waiver or acquiescence.

The circumstances under which any of the payments of assessment were made prior to 1931 are in no manner elucidated. Since the primary function of appellee is the sale of its repossessed water rights, in order to be reimbursed for its construction costs, it is almost a necessary inference that such payments as it made were required to clear its titles in order that resales to settlers might be accomplished; but the mere submission to illegal exactions in the circumstances in which appellee was put should by no means compel it to submit indefinitely to such illegal exactions.

(B)—The Trial Court Properly Rejected Appellant's Evidence of Its Subsequent Suits Filed in the State Courts to Enforce Its Maintenance Liens Here Involved.

At the trial, Exhibits 33 and 34 were offered in evidence; these were the complaints in the fore-

closure suits filed in the state court after this suit was begun. The court refused to admit the exhibits over appellee's objection (R. 219) and on motion of appellee also struck that portion of Witness Barclay's testimony to the effect that similar suits had been commenced in Gooding County (R. 216, 217). The court also concluded that appellant's alleged maintenance lien for 1935 no longer binds any of appellee's property (R. 110, R. 134). Appellant assigns error with respect to these rulings (Specification of Errors IX, XIV-B, and XVI). The basis of the trial court's conclusions on these points are as follows:

This suit brought before the federal court below for adjudication the relative dignity or priority of appellant's maintenance liens for the years 1935, 1936, and 1937 upon the property here involved as against appellee's claim of lien thereon. After this suit was begun, appellant brought four suits in the state courts to foreclose the *identical* maintenance liens here involved. These state court suits admittedly presented for determination precisely the same issues with respect to the same property, and necessarily involved an unavoidable and intolerable conflict of jurisdiction.

Section 41-1905, I. C. A., relating to appellant's maintenance liens provides as follows:

> "No lien provided for in this chapter binds any land for a longer period than two years after the filing of the statement mentioned in Section 41-1903 unless proceedings be commenced in a

proper court within that time to enforce such lien".

The question involved in the court's rulings which appellant assigns as error is whether or not, after the federal court below had obtained exclusive jurisdiction to adjudicate and determine in this suit the validity of appellant's specific maintenance liens, any other court than the court whose prior jurisdiction was invoked was a "proper court" within the meaning of the above statute, in which to foreclose appellant's identical liens involved in this suit. If in the situation presented at the trial of this case the other courts were not "the proper courts" in which to foreclose such liens, then admittedly the 1935 maintenance lien no longer was binding upon appellee's land in any respect. The 1935 lien statement or claim of lien was filed December 30, 1935 (R. 99). Therefore, by the terms of the statute the time for foreclosing it in "a proper court" expired December 30, 1937. Admittedly, the only such suits so begun were those improperly (as we think) begun in the state courts of Gooding and Jerome Counties on December 24, 1937. Exhibits 33 and 34 were proferred as evidence that as required by the statute appellant had taken the proper steps to preserve its liens.

Objection was made by appellee to the introduction of evidence of the commencement of these suits, in part because a month after the filing of this suit,

"and after the records and files disclosed that appearance was made, a suit was begun in an-

other court to foreclosure these liens, and it is our theory that after this court obtained jurisdiction of the subject matters of these liens, no other court was a 'proper court' to begin action for the foreclosure of the liens" (R. 218).

Since the trial court sustained the objection, it must be assumed, in the absence of anything to the contrary in the record before this court, that the files of the lower court disclosed that the suits in the state court were begun as stated after the actual appearance of appellant in the federal court below. The question is thus squarely presented whether in these circumstances these state court suits were, in accordance with the Idaho statute set out above "proper courts" in which to enforce appellant's liens in controversy here. It is appellee's view, sustained by the federal trial court, that when once that court acquired exclusive jurisdiction by this suit to quiet title to determine the validity of appellant's liens, such court alone was the only "proper court" before which the appellant could enforce any of those liens by suit of foreclosure. Otherwise, a conflict of jurisdiction would arise, incompatible with the dignity and decorum of any judicial procedure.

Appellant could not, after its appearance in the federal court below, defy and avoid the jurisdiction of that court and create a multiplicity of suits involving the same issues and the same property. It should not be permitted to take advantage of its own improper act and enjoy the preservation of a lien which admittedly had expired by limitation, except

for the improper filing of the state court suits.

This is an action in rem. It involves conflicting claims to real property, involving precisely the same liens and the same property as the foreclosure suits later brought in the state courts. Appellee's suit here invoked the jurisdiction of the court below to declare appellant's maintenance liens *for the years in question invalid.* Appellant's suits for foreclosure subsequently invoked the jurisdiction of other courts to declare the same identical liens *valid* and to *enforce and foreclose* them. Here is presented an unavoidable and head-on collision. While the federal court is clearing the title of property from a lien another court cannot be permitted to enforce the same lien.

Beyond question, if appellee had had advance notice of appellant's purpose to begin these later state court suits, their commencement would have been enjoined upon its application. The only ground upon which their commencement would have been enjoined was because in the special circumstances the state courts were not the "proper courts" in which to foreclose the liens. It follows inevitably that if in the circumstances the commencement of these suits was wrongful, and subject to injunction as creating a multiplicity of suits and a conflict of jurisdiction, the appellant should not be permitted to take advantage of such wrongful act as a step lawful in the preservation of its lien.

By sustaining appellee's objection to the introduction of the evidence, the federal court below merely protected and vindicated its own jurisdiction. Under

the authorities, it could not stultify itself by ruling, when the question was presented to it, that in the circumstances here presented the state courts were at the time the suits were filed in any sense the proper courts in which appellant might foreclose its liens.

In the case of Covell v. Heyman, 111 U. S., 176, 28 L. Ed., 390, 393, the United States Supreme Court said:

> "The forebearance which courts of coordinate jurisdiction, administered under a single system, exercise towards each other, whereby conflicts are avoided * * * is a principle of comity with perhaps no higher sanction than the utility which comes from concord; *but between state courts and those of the United States, it is something more. It is a principle of right and of law, and therefore of necessity. It leaves nothing to discretion or mere convenience * * * and when one takes into its jurisdiction a specific thing, that res is as much withdrawn from the judicial power of the other as if it had been carried physically into a different territorial sovereignty*". (Emphasis ours).

The cases are numerous to the same effect. They apply solely to *inevitable conflicts of jurisdiction* where the same parties, the same issues, and the same property are involved.

Appellant argues that the district courts of Idaho are courts of general jurisdiction under the Idaho

constitution and statutes and, therefore, its subsequent foreclosure suits in the state courts were justified and proper. We think the argument is wholly fallacious. Very probably the district courts of California are courts of general jurisdiction; but could it be claimed that under the language of Section 41-1905, I. C. A., a suit by appellant in a district court of California to foreclose its liens would have been brought in "a proper court" within the meaning of that statute?. By the language of the statute it was not sufficient merely to bring a foreclosure suit. The suits to foreclose the 1935, 1936 and 1937 liens had to be brought in a "proper court"; and after the federal court below obtained jurisdiction of the parties, of the subject matter, and of the property, its jurisdiction became exclusive and it alone was the proper court in which appellant might foreclose those particular liens.

It was not requisite that appellee, to protect the prior jurisdiction of the federal trial court should be put to the expense of employing counsel to enjoin the commencement or prosecution of the subsequent suits in the state court. Any action by the federal trial court designed to prevent appellant profiting by its course in attempting to create a conflict of jurisdiction and a multiplicity of suits was proper in the preservation of its jurisdiction.

The trial court's ruling in rejecting the proferred evidence, however, is an immaterial matter. If the rejected evidence had been admitted, the court's conclusion as to the legal effect of the suits improperly

begun would of necessity have been the same as if no evidence had been introduced. Moreover, it is wholly unnecessary for this court to consider any aspect of the questions discussed under this heading if its conclusion on the fundamental question involved in this suit is the same as that reached by the trial court. If appellant's maintenance liens are subordinate to appellee's claims to the property here involved, then whatever steps may have been taken by appellant in the recording or preservation of its liens become immaterial.

Before leaving this subject, it should be remarked that a wholly different question is here involved than that heretofore discussed in connection with appellant's "plea in abatement". The court below declined to abate this suit because it involved a *wholly different controversy and cause of action* than any cause of action involved in the prior state court suits; and in the trial of this suit it rejected as evidence appellant's Exhibits 33 and 34 because the *later* suits brought in the state court involved *the identical controversy and cause of action* embraced in this suit. After the beginning of this suit, only one court was in any reasonable sense or construction "the proper court" in which (while this cause is pending) the appellant might foreclose the identical liens here involved. It could and should, if limitations of time required their foreclosure, have sought such foreclosure by appropriate cross-complaint in the trial court below.

(C)—Alleged "Offset" Against Statutory Assessments.

On page 78 of appellant's brief occurs a discussion (not found in the "Summary of Argument") of its specification of errors Nos. 8 and 15.

Those specifications of error and the discussion of them wholly distort appellee's position and the theory of the trial court in making the findings and the rulings on evidence of which appellant complains.

No one has ever asserted that there is authority in law for permitting a water user to offset *statutory assessments* for maintenance and operation by showing that he did not use his water and that this resulted in an advantage to other stockholders. If appellant's maintenance assessments here involved are valid as *statutory assessments as against the prior construction lien of appellee*, then appellee cannot claim nor should it claim an offset against the assessments by reason of the fact that it did not use the water during the years in question.

But that is not at all the point involved in the court's rulings. Appellant in its third affirmative defense (R. 52) claimed an *equitable* lien against appellee's property because, as it alleged, a very substantial portion of the moneys collected by virtue of the assessments in question had been expended in the improvement and betterment of the irrigation system and (R. 54) "in equity and good conscience plaintiff herein and its land and water rights * * * should be required to pay their equal and ratable proportion" of the expense incident to such maintenance and improvement. A large part of the testimony of-

fered by appellant had to do with these alleged improvements and betterments.

In these circumstances, it was necessary for the trial court to consider the *equities* between the parties and the evidence disclosed the following facts: That appellee never at any time used any irrigation water upon any of its lands involved in this suit subsequent to the time they came back into its possession after the uncompleted sales to settlers', and that the water so unused upon the lands of appellee but represented by the appurtenant water stock went to the benefit of the stockholders on the project who were farming and irrigating their lands. It also appeared that there were certain years which were "dry years" when the appellant canal company to save the crops was supplementing its water supply by leasing and purchasing additional water. In such years, the benefits to the other stockholders from the non-use of water appurtenant to the repossessed lands to appellee while dormant and waiting resale to other settlers were, of course, very apparent.

Not only was this true with respect to the water represented *by the stock in the appellant company* apppurtenant to appellee's said lands, but these same lands of appellee, by reason of their inclusion in the American Falls Irrigation District, had appurtenant to them *an additional and wholly independent water right* not represented by stock of the appellant company and in which the appellant canal company and its other stockholders had no interest whatsoever (R.

241, 270). This independent water right "amounted to 1.13 acre fee per acre, increased by 50% if the reservoir was filled" (R. 241); in other words, 1.70 acre feet per acre (R. 269). The settler stockholders of the appellant company, other than appellee, got the benefit of all this water.

It is easily apparent, moreover, that the principal expenses paid out of the moneys collected for maintenance is related to the actual distribution of water among consumers; that is, the salaries of ditch riders. Since the annual assessments of the appellant company have ranged from $1.00 to $1.50 per year (R. 227), its collections over a period of ten years must have approximated $2,000,000.00, and of this amount the utmost claims of appellant are that over a period beginning in 1928 and up to the present time it has incurred expense not exceeding $480,000.00 in betterments and improvements to the irrigation system as distinguished from water distribution expense. Thus, approximately 75% of the maintenance moneys have been paid out for expenses connected with the actual distribution of water among consumers. Appellee's land received no part of this distribution. It appears from the evidence that up to and including the year 1931 appellee has paid assessments of about $100,000.00 (R. 241) upon its lands, for which it was not legally liable. Appellee's lands constitute approximately one-seventeenth of the entire project (R. 242). Its full equitable share of all possible improvements to the system made by appellant could in no event, therefore, exceed $30,-

000.00. It is thus apparent that, viewed from any *equitable* standpoint, appellee's lands have borne more than three times their full equitable share of any betterments and improvements to the irrigation system shown at any time to have been made by appellant; and that all this was during a time when the lands of other stockholders were receiving not only the benefit of all the water represented by appellee's repossessed and still unsold water stock, but also an independent water supply (American Falls Irrigation District) from these same lands of appellee amounting to around 19,000 acre feet a year.

These were the considerations which impelled the trial court to receive the evidence and reach the conclusions it did concerning the non-use of water on appellee's property and the use of the same water upon the lands of appellant's settler-stockholders. The whole bearing of the matter was upon appellant's alleged *equitable lien.*

The admission of evidence that appellant used the water appurtenant to appellee's lands here involved upon the lands of its other stockholders was received on the above theory and not at all, as stated by appellant, on the theory that an offset against lawful *statutory assessments* could or was being claimed by appellee by reason of its non-use of water.

Evidence of the use of water by appellant upon the lands of its other stockholders was, of course, also wholly and highly relevant in negativing the additional defense made by appellant that appellee through non-use of the water had abandoned and for-

feited the water rights appurtenant to its lands. (Court's opinion R. 165). And the courts finding as to such use (R. 109) is conclusive on the issue of abandonment as hereinafter shown.

(D)—The Court Did Not Err in Holding That There Was No Evidence Showing the Amount Expended in Improvements and Betterments of the Irrigation System During the Years Here Involved.

The court found (R. 105) that certain improvements had been made in the irrigation system, extending over a period of approximately ten years but that: "No evidence appears showing the amount of such improvements done in the aggregate during the three-year period (1935-1937, inclusive) involved in this suit".

Appellant assigns this as error and discusses the matter briefly on page 80 of its brief.

The controversy here, as frequently stated, involves assessments for the years 1935 to 1937, inclusive.

At the beginning of appellant's testimony, the trial court inquired:

> "The Court: Then so far as we are concerned, the levies are for 1935, 1936 and 1937?
>
> "Mr. Stephan: That is correct" (R. 213).

Since appellant admits that it is foreclosing in the state courts its alleged *statutory liens* for maintenance for the years 1932, 1933, and 1934, it is reasonably obvious that it cannot at the same time claim in this court in this suit *equitable liens* for the same years. Moreover, as shown above, its counsel by his

above quoted answer to the court's question and in accordance with the stipulation and agreement alleged in its answer (R. 50) eliminated any controversy relating to the validity of appellant's maintenance liens for the years 1932, 1933, and 1934.

Appellant, nevertheless, in support of its alleged equitable lien pleaded in its answer, offered evidence and was permitted to introduce it, as to expenditures made in the aggregate for the improvement and betterment of the irrigation system over a long period beginning with the years 1927 and 1928, when an interest in "what is known as the Gooding Canal, together with A Siphon and B Siphon", was acquired (R. 226). The witness Delbert Henderson (R. 220) testified as to betterments on certain laterals since the year 1931. There was no attempt at segregation of the expenditures made for betterments and improvements during the years 1935 to 1937, inclusive, as distinguished from the aggregate of the improvements made during all the years from 1927 and 1928 and onward.

The court's finding above quoted and of which appellant complains was based upon this situation. The finding is fully justified by the state of the record and the agreed limitation of the issues involved in this suit. Appellant does not seriously attempt to discuss the real question. If the court had found in favor of defendant upon its claim for an equitable lien upon appellee's property for its fair and just share of any improvements or betterments made upon the system for the years 1935 to 1937, inclu-

sive (the years involved in this suit) it would have been wholly unable to determine the amount of such lien.

In view of the fact that the Supreme Court of the United States in the Portneuf case fully disposed of the equitable lien theory of appellant, and in view of the trial court's conclusion (R. bottom page 167) that "it would be stretching the imagination to say that under the evidence the equities are in favor of the defendant", it would seem that the matter here discussed is immaterial.

Appellant does not urge in its brief its theory of an equitable lien; but apparently relies here on the priority of its statutory liens. The trial court's conclusion with respect to any alleged equitable lien claimed by appellant would seem to be a matter of balancing and weighing the evidence concerning the respective equities of the parties, and thus particularly a matter within the province of the trial court, the conclusions of which would not be disturbed except for palpable injustice. It is perhaps these considerations which have led appellant not to urge in this court its claim of an equitable lien. The trial court's conclusion here discussed, to the effect that the evidence is insufficient to enable it to determine the expenditures in the improvement of the system made by appellant during the years 1935 to 1937, inclusive, here involved, could only be pertinent in any respect if appellant were entitled to an equitable lien for improvements made to the system during the years here in question.

(E)—Appellee's Right to Water Has Not Been Lost by Non-user.

Appellant assigns as error (Specification No. 6) the court's conclusion (VIII, R. 113) that the water rights appurtenant to appellee's lands here involved had not been abandoned or forfeited by non-user.

It is admitted by appellant and expressly found as a fact by the court (R. 105) that the lands in controversy herein were not irrigated and received no water from the system during any of the years since the date of their acquisition through foreclosure or quitclaim deed. But it is also found (R. 109) that the appellant and its stockholders (other than appellee) have during those years continuously used this water upon the lands of the project belonging to such other stockholders. It is elementary that use of water on lands other than the lands to which the same is appurtenant does not create an abandonment or forfeiture of a water right.

Mahoney v. Nieswanger, 6 Ida., 750; 59 Pac. 561;

Joyce v. Rubin, 23 Ida., 296; 130 Pac. 793;

Joyce v. Murphy Land Co., 35 Ida., 549; 208 Pac., 241;

In re Department of Reclamation, 50 Ida., 573, 579.

Moreover, the state contract itself (Exhibit 1, R. 182) provides that the water rights appropriated were "taken for the benefit of the entire tract of land to be irrigated from the system". Appellant itself is the legal owner of all the water rights represented

by its shares of stock, the holders of the stock certificates being the equitable or beneficial owners of the right to the use of the water represented thereby. The relation of the appellant company to all of its stockholders (including appellee) is of a fiduciary nature; the appellant company cannot urge that the water rights in question which it has itself been continuously using for the benefit of its other stockholders have been forfeited or abandoned. Moreover, all the stockholders of appellant corporation are tenants in common in the use of the water rights and the use of water by one tenant in common is deemed to be the use of all.

In the case of Washington County Irrigation District v. Talboy, 55 Ida., 382, the court said (page 393):

> "The contention that appellant had abandoned its water right is not tenable. That the water right itself had not been abandoned is demonstrated by the fact that the water was actually diverted from the natural stream and impounded in the reservoir each year, and no other appropriator was contesting the right of the reservoir owners to divert and impound the water, and we have no controversy here between prior and subsequent appropriators".
>
> "The law presumes that the possession of one cotenant is the possession of all the cotenants, and no presumption of abandonment arises in such cases".

The trial court in its opinion (R. 165, 166) mentioned only a few of the very numerous authorities supporting all the foregoing propositions. Appellant makes no serious attempt to controvert the court's conclusions or the legion of authorities that might be adduced to support them.

Without taking space to quote here from the opinion of Judge Cavanah on this point, we respectfully direct to it the attention of this reviewing court (R. 165, 166).

(F)—Exhibits 38 and 39, Showing a Legal Opinion of E. A. Walters, Were Inadmissible as Evidence.

Appellant assigns as error (Specification No. 17) and discusses in its brief (page 82) the court's action in rejecting as evidence Exhibits 38 and 39 (R. 238-240).

Exhibit No. 38 is a letter (R. 238) addressed by Mr. Hurlebaus, as secretary of the appellant company, to Walters & Parry, Attorneys at Law, Twin Falls, Idaho, asking legal advice. It appears that Walters & Parry were acting as attorneys for the Land & Water Company during the year 1925 (R. 237), that being the year when the inquiry was made. It also appears that that firm of attorneys or a somewhat similar firm of attorneys at various times acted also as attorneys for the appellant company (R. 214). The tenor of Mr. Hurlebaus' letter asking for advice (Ex. 38; R. 238) highly resembles a letter of inquiry by a client to his own attorney.

Exhibit No. 39 is the reply of Mr. Walters to the

request of the secretary of appellant company "for advice".

Mr. Walters in his reply expresses a purely legal opinion. The opinion does not have at all the scope claimed for it by appellant. By clear inference, it expresses the opinion that after foreclosure of the settlers' water contracts and so long as the Land & Water Company or the trustee for the bondholders retained title to the property it was exempt from assessment. But he also expresses the opinion that when the title to the property passed to the subsidiary investment company, its status was changed and it then became subject to maintenance assessments, as if in the hands of a private party.

Assuming that Mr. Walters was acting as attorney for the construction company during the year 1925, the scope of his employment is nowhere shown; and even if it were shown that Mr. Walters or his firm had been employed to investigate the particular point of law expressed in his opinion, we think that evidence of such opinion would be wholly inadmissible on elementary principles. The question here is not what any attorney may have thought the law was at any time, but what the court, in the light of all the facts adduced in evidence, concludes the law actually is. Mr. Walters' letter was written either at a time when the Portneuf case was pending before this court or very shortly after the opinion was released. While the opinion of this court reversing the trial court is dated May 25, 1925, a petition for rehearing was filed soon thereafter and briefs sub-

mitted on both sides before the petition for rehearing was denied and the opinion finally released. The Portneuf case had not been finally adjudicated and the law was then uncertain. Indeed, appellant insists that the law is still uncertain. Especially in these circumstances, the opinion of any particular attorney at that time, whether correct or incorrect, is wholly irrelevant as evidence.

The undisputed facts as disclosed by the evidence here is that the investment company ever since 1913, when the bondholders took over the affairs of the project, has been a wholly owned subsidiary of the construction company, used solely and entirely as an agency and instrumentality for holding and reselling the properties repossessed through foreclosure of the Carey Act construction liens. Mr. Walters was either misinformed as to the facts or in error in his opinion of the law. The letter is no more admissible in evidence that would be the opinion of any one of the various counsel involved in this suit with respect to any particular point of law involved.

IV

GENERAL COMMENTS ON PORTIONS OF APPELLANT'S BRIEF

(A)—Province of State and Federal Courts in This Case.

Appellant's statement on page 22 of its brief that a decision in favor of appellee in a state court would be more conclusive, broader, and more far-reaching than a decision in the case at bar, and the further statement (page 38) that the decision of the federal

courts "would only settle the question as to the particular landowner who is a party to the suit" are equally erroneous. There is no other landowner on this project who is in the status of appellee. There was only one construction company on the project and only one trust deed. No other landowner could possibly be in the status of appellee. Moreover, the decision of the questions here involved embrace considerations affecting the intent of Congress in passing the original Carey Act; and the construction of Sec. 41-1901 I. C. A. urged by appellant would involve a conflict with the Federal Constitution. All the state statutes which must be construed are but the offspring of the federal Carey Act law which authorized and set forth the scheme of reclamation of desert land set out therein.

(B)—"Exemption" of Appellee's Property from Assessments.

On page 48 of appellant's brief, it complains of the ruling of the trial court to the effect that the property of appellee here is "exempt from assessment". As will be observed from the terms of the court's opinion, findings, and decree herein, the exemption granted is a limited and qualified exemption. The property is made exempt from assessment only to the extent that appellee is permitted to obtain its authorized construction costs for the project out of the property before being deprived of this privilege by intervening maintenance assessments; the trial court's decree holds the construction company and its bondholders to their original status as trus-

tees, a vehicle for placing the reclaimed lands in the hands of actual settlers, as indubitably contemplated by the act of Congress. The qualified exemption from assessment decreed by the trial court prevents the construction company or its bondholders from monopolizing and profiting from the reclaimed land. It lays upon appellee the obligation to resell the land whenever it can obtain therefrom reimbursement for the construction costs. While preventing the appellee from profiting from this Carey Act enterprise, at the same time the decree permits it, so far as possible, to be reimbursed for its outlays and expenditures. Beginning at the bottom of page 63 of appellant's brief begins a statement that expresses appellee's position exactly:

> "Appellee merely had a franchise from the state for the construction of irrigation works; and for the cost of constructing the works it was permitted to collect from the settlers the amounts specified in the state contracts."

The same viewpoint has been repeatedly expressed by the Supreme Court of Idaho in such language as the following:

> "The construction company's interest in the reservoirs, dams, water rights, etc., is represented by the lien provided by law to cover the cost of construction".
>
> Idaho Irrigation Co. v. Lincoln Co., 28 Ida., 97.

Appellant's brief (page 64) contains fairly com-

prehensive citation of various other opinions of the Supreme Court of Idaho, expressing the same view. Indeed, under the theory of the federal Carey Act no other view could be entertained.

(C)—Exemption from Assessments Not by Implication

On page 49 of appellant's brief, it is stated that "an intention on the part of the legislature to grant an exemption from assessments" must be expressed in clear terms and that "exemptions are never presumed". As applied generally to taxes and assessments of municipal and public corporations, the foregoing statement may be true. But the controversy here is purely between private interests. It is a controversy between the settlers who have bought water rights on the project, on the one hand, and the construction company and its bondholders on the other. The appellant company in this case really represents the landowners who are irrigating and farming the lands.

And in this case, the exemption from assessment is not by implication. Just as in the Portneuf case, it is fairly clearly expressed by the governing contracts and by-laws interpreted in the light of the statutes which were incorporated in them.

We have elsewhere in this brief attempted to point out the precise identity between the issues determined in the Portneuf case and this present case. There are still one or two points of almost precise similarity that we have omitted to emphasize. One point is the identity between the by-laws of the oper-

ating company in the Portneuf case and by-laws of the appellant company here. The by-law of the operating company in the Portneuf case as set out in this court's opinion in that case is quoted as follows on page 87 of appellant's brief:

> "All shares of this corporation shall be held subject to the rights of the Portneuf-Marsh Valley Irrigation Company, Limited, until the amount due to such company, its successors or assigns, shall have been fully and finally paid, as provided in the contract between said corporation and the purchasers of shares, and as provided in the contract between the said Portneuf-Marsh Valley Irrigation Company, Limited, and the State of Idaho".

For purposes of comparison, we quote as follows from Article 10, Section 5, of the by-laws of appellant company here (R. 190):

> "All the stock of this corporation shall be issued to and held by the Twin Falls North Side Land and Water Company, its successors or assigns, in order to enable it to deliver shares of stock to purchasers of water rights, but said shares of stock shall have no voting power and shall not have force and effect and shall not be assessable for any purpose either for maintenance or otherwise, until they have been sold or contracted to be sold to entrymen or owners of land under the irrigation system, and all assessments, maintenance and other charges must be

> paid by the purchaser or owner of the stock and not by the Twin Falls North Side Land and Water Company, its successors or assigns".

We submit that the purpose and intent of the two by-laws, in the light of the governing statutes, are identical.

Also on page 87 of appellant's brief attention is called to the language of the Supreme Court of the United States in the Portneuf case (page 639 of the official report, p. 1270, 71 L. Ed.) where it is stated that "The *contract between the two companies* was to the same effect". This means, of course, to the same effect as the Portneuf operating company's by-law as above quoted; and appellant's brief further states (page 87):

> "There is no such contract between appellee and appellant".

Again by reference to the printed record in the Portneuf case it will be found (Portneuf R. 264) that the contract between the two companies in that respect was in the precise terms of the above quoted by-law of the operating company in the Portneuf case; and further that the contract provided that such by-law should be irrepealable without the consent of the construction company (Portneuf R. 265).

But we think that the by-law of the operating company here, which exists at the present time unrepealed, is just as effective as a contract between the parties to this litigation as if it were embodied in a

formal instrument signed by each. It embodies the conditions under which the stock of appellant company was issued and is held. In the light of the governing federal and state statutes and the state contract under which the rights of both parties as they exist originally attached, any repeal or disregard of the provisions of this by-law, would be in breach of appellee's rights. So again, appellant in vain seeks a distinction between the Portneuf case and this case based upon any real difference between the by-laws and contracts involved.

(D)—The Bearing of Section 41-806, Idaho Code Annotated.

On page 62 of appellant's brief, attention is called to Section 41-806, Idaho Code Annotated, and that statute, together with the decisions of the Idaho Supreme Court there cited, is said to evidence an established public policy in the State of Idaho for upwards of forty-four years that an irrigation company shall have a prior lien on land for water service.

Again on page 88 of appellant's brief the same section 41-806, I. C. A., (formerly Section 5631 of the Compiled Statutes), is again referred to with the statement that the Supreme Court of the United States in the Portneuf case stated that statute was not applicable to the case. It is equally *inapplicable here*, for many reasons. A portion of the statute is quoted in the appendix to appellant's brief (p. ii). The first sentence reads as follows:

> "The amount to be paid by said party or parties for the delivery of said water, which

amount may be fixed by contract, or may be as provided by law, is a first lien upon the land for the irrigation of which said water is *furnished and delivered*".

One of the obvious reasons why the statute is not applicable here is because admittedly no water has ever been either *furnished* or *delivered* to appellee's lands.

But the inapplicability of the statute goes even much further. An analysis of its history and context shows beyond dispute that the intent of the legislature in passing it was to afford a construction company selling or renting water rights *a paramount lien upon the land* for the *purchase price* of *such* water. And section 41-806 alone, independent of the special Carey Act statute, would be sufficient to support *appellee's* claim in this case instead of appellants.

The records of this court in the Portneuf case will show that after the original opinion was filed the Portneuf operating company filed a petition for rehearing. The ground of the petition for rehearing was the statement that this same Section 41-806 I. C. A. (then Section 5631 Compiled Statutes) had not previously been called to the attention either of the trial court or this court; and that such section rightly construed supported the operating company's contention. The same thing is now urged here. This court then required both parties to submit briefs on

this identical point in order to determine whether a rehearing should be granted. In the brief of Brown & Chapin, Trustees (then appellants in this court) will be found a full analysis of the entire legislative act of which Section 41-806 I. C. A. is a part, and in the appendix of the brief, the legislative act (passed in 1895) is set out in full. The Portneuf operating company filed a reply brief in support of its petition for rehearing. The rehearing was then denied by this court.

We assert with some confidence that the appellant's brief in the Portneuf case upon the question of whether a rehearing should be granted, filed in this court upon the court's request, conclusively demonstrates that the lien referred to in Section 41-806, I. C. A. (then Section 5631) was intended to be and is a lien for the *purchase price or rental consideration for water furnished by a construction company and not a lien for maintenance and operation.* If the matter is considered material by this court, we trust that those briefs on the matter of granting rehearing in the Portneuf case will be read and considered by this court in determining the scope of its decision in the Portneuf case.

In conclusion we respectfully submit that on the fundamental questions here involved, the decision of this court and the Supreme Court of the United States in the Portneuf case is wholly controlling; that those decisions and the conclusions of the trial court below in harmony therewith, announce sound

and just principles, grounded upon the intent of the federal Carey Act and the state legislation accepting its provisions; likewise that the rulings of the trial court upon the collateral issues involved are supported by sound reasons and ample authority, and that the decree should be in all respects affirmed.

Respectfully submitted,

EDWIN SNOW,

Residence: Boise, Idaho,

A. F. JAMES,

Residence: Gooding, Idaho,

Attorneys for Appellee,

Idaho Farms Company.

APPENDIX

Opinion, dated February 21, 1939, of State District Judge Guy Stevens, in suit brought in the District Court of Jerome County, Idaho, for foreclosure of maintenance lien for the year 1932.

IN THE DISTRICT COURT OF THE ELEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF JEROME

NORTH SIDE CANAL COMPANY, LIMITED, a corporation, Plaintiff,
vs.
TWIN FALLS NORTH SIDE INVESTMENT COMPANY, LIMITED, a corporation, Defendant.

2053
MEMORANDUM DECISION

The plaintiff is a Carey Act Operating Company, and has brought this action for the purpose of foreclosing the lien of assessments levied by said company for operation and maintenance for the year 1932 upon certain lands and water rights described in the complaint.

The Twin Falls North Side Land and Water Company, Limited, was the Carey Act Construction Company of the Carey Act Project of which the plaintiff is the Operating Company.

The Twin Falls North Side Investment Company was a subsidiary corporation of the Construction Company. The stock of such subsidiary corporation having been held and owned by the Construction Company.

The Construction Company pursuant to and as authorized by the State Contracts executed its deed of trust to the American Trust and Savings Bank, trustee, for the purpose of securing funds with which to construct the project as provided in the State Contracts. Bonds in the sum of five million dollars were issued by the Construction Company and the money derived from the sale of these bonds was used in the construction of the project.

In December, 1927, The Continental National Savings Bank and Trust Company by various mergers became the successor trustee for the bondholders.

The Construction Company organized the North Side Canal Company as a corporation and said corporation then

issued its stock in the sum of two hundred thousand dollars, which was delivered to the Construction Company, all pursuant to the State Contracts. The Construction Company obligated itself, under the State Contracts, to sell water rights to Carey Act Entrymen on the segregation, and to others whose lands could be irrigated from the canal system for specified sums. Upon the sale of a water right to a settler by the Construction Company, a written contract was entered into by the Construction Company and the settler and a certificate of stock of the Operating Company was issued upon certain conditions to the purchaser of the water right, entitling the owner thereof to one-eightieth of a cubic foot of water per second of time for each acre of the land described in the contract. Upon the execution of these contracts, they were, from time to time, assigned to the trustee for the bondholders, and thereupon became subject to the lien of the trust deed, and payments upon the contracts were applied to the liquidation of the bonds. In 1913, prior to the completion of the system, and before water had become available for the irrigation of all the lands in the project, the Construction Company became insolvent. The bondholders then appointed a Bondholders' Protective Committee, who advanced large additional sums of money on behalf of the bondholders, which sums were used for the completion of the irrigation system. The committee acting in conjunction with the trustee took over the project and operated it until 1921, at which time the project was turned over to the Operating Company.

The Construction Company entered into numerous contracts with settlers for the sale of water rights and these contracts were assigned to the trustee. On many contracts the settlers failed to make the payments as specified, and after default, the trustee proceeded to foreclose the liens in some cases, and in others took deeds in lieu of foreclosure. The lands and water rights involved in this action were a portion of those thus acquired by the Construction Company, and its subsidiary corporation, or the successor or assigns of the Construction Company prior to 1932. A controversy having arisen among the interested parties as to the relative priority of the liens for assessments for maintenance and operation, and the liens of the water contracts, a written agreement was entered into in 1926 by which the parties endeavored to adjust their differences and avoid litigation. The Operating Company levied an assessment upon the lands and water rights herein involved for the year 1932, and it seeks to foreclose said lien in this action and have said lien established as prior to any lien claimed by defendant.

Defendant states in its brief (J-28): "It is the contention of defendant that any assessments levied by plaintiff for maintenance are subject and subordinate to defendant's prior construction liens; and that this is true not only while the property is under contract of sale to the settler, but in case of unsuccessful sales, then after repossession of the property by foreclosure or quitclaim deed."

On page (J-6) of its brief, the defendant says: "This property (referring to the property involved in this suit) the defendant claims to hold—until resale to other settlers—exempt from assessment the same as if it had never been sold at all, inasmuch as the previously attempted sale has failed and come to naught.

"The plaintiff Operating Company, on the other hand, claims that by appropriate proceedings for imposing a maintenance assessment during the year 1932 it has a valid lien upon such portion of this property as is described in its complaint which lien is prior and paramount to any lien or claim of the construction company or its bondholders; and in this suit it is seeking to foreclose its 1932 lien."

The plaintiff claims a prior lien for assessments under the provisions of Section 41-1901, Idaho Code Annotated, which provides as follows:

> "Any corporation heretofore organized or any corporation that shall hereafter be organized for the operation, control or management of an irrigation project or canal system, or for the purpose of furnishing water to its shareholders, and not for profit or hire, the control of which is actually vested in those entitled to the use of the water from such irrigation works for the irrigation of the lands to which the water from such irrigation works is appurtenant, shall have the right to levy and collect from the holders or owners of all land to which the water and water rights belonging to or diverted by said irrigation works are dedicated or appurtenant regardless of whether water is used by such owner or holder, or on or for his land; and also from the holders or owners of all other land who have contracted with such company, corporation or association of persons to furnish water on such lands, regardless of whether such water issued or not from said irrigation works, reasonable tolls, assessments and charges for the purpose of maintaining and operating such irrigation works and conducting the business of such company, corporation or assoscation and meeting the obligations thereof, which tolls, assessments and charges shall be equally and ratably levied and may be based upon the number of shares or water rights held

> or owned by the owner of such land as appurtenant thereto or may be based upon the amount of water used; and such company, corporation or association of persons shall have a first and prior lien, except as to the lien of taxes, upon the land to which such water and water rights are appurtenant, or upon which it is used, said lien to be perfected, maintained and foreclosed in the manner set forth in this chapter: provided, that any right to levy and collect tolls, assessments and charges by any person, company of persons, association or corporation, or the right to a lien for the same, which does or may hereafter otherwise exist, is not impaired by this chapter."

The defendant claims a prior lien under the provisions of Section 41-1726, Idaho Code Annotated, which provides as follows:

> "Any person, company or association, furnishing water for any tract of land, shall have a first and prior lien on said water right and land upon which said water is used, for all deferred payments for said water right; said lien to be in all respects prior to any and all other liens created or attempted to be created by the owner and possessor of said land; said lien to remain in full force and effect until the last deferred payment for the water right is fully paid and satisfied according to the terms of the contract under which said water right was acquired."

It appears that the plaintiff has complied with the provisions of Title 41, Chapter 19, I. C. A., 1932, with respect to levying, filing its claim of lien, and proceedings to foreclose its lien.

The plaintiff contends that the Supreme Court of Idaho has decided that the Operating Company has a prior lien to that of the Construction Company, and that this court is bound by said decisions and cites the case of Carlson-Lusk Hardware Company vs. Kammann, 39 Idaho, 654, and Trust and Savings Bank vs. Werner, 36 Idaho, 601, in support of its contention.

It became necessary therefore to examine those decisions to ascertain if they are authority in support of plaintiff's position. The question involved in the Lusk Case was the relative priority of the lien of a mortgage and the lien of a Carey Act Operating Company for an assessment. The Court there held that the lien of the mortgage was prior to that of the assessment, and intimated that had it been

alleged and shown by the evidence that the Carey Act Operating Company was actually controlled by the Water Users themselves, it would have held that the lien of the assessment was prior to that of the mortgage. The Carey Act Construction Company was not involved in the case and the decision in the case does not support the contention of plaintiff in this case.

The question involved in the Werner Case was whether the lien of a Carey Act contract was prior to the lien for taxes. After quoting C. S., Sec. 3019 (now 41-1726 I. C. A.) the Court said:

> "Under C. S., Sec. 3019, supra, the only liens to which the lien of a Carey Act contract is superior are those created or attempted to be created by the owner and possessor of the land * * *."

This is the language relied upon by the plaintiff. The Supreme Court in the Werner Case quoted from the case of Minnesota vs. Central Trust Company, 94 Fed., 244, 36 C. C. A., 214, as follows:

> "* * * it cannot be inferred that the lien for personal taxes * * * was intended to be subordinate to all prior private liens, because the legislature failed to say that it should be deemed paramount. On the contrary, considering the character of the obligation and the dignity usually accorded to such liens, in public estimation, and above all, considering the necessity which exists for giving them priority in order that the public revenues may be promptly and faithfully collected, we conclude that the inference should be that the lien was intended by the legislature to be superior to all liens, prior or subsequent, claimed by individuals, and that nothing should be allowed to overcome this inference but a plain expression of a different purpose found in the statute itself."

It will thus be seen that the facts in the Werner Case are different from those in the instant case, and it is my opinion that the decision in that case is not authority for the position of plaintiff. This opinion of mine is strengthened by the decision of the United States Supreme Court in the case of Portneuf-Marsh Valley Canal Company vs. Brown, et al., 47 Supreme Court Reports, 692. After a consideration of the provisions of the Carey Act Law, the State Contracts, and pertinent statutes, having in mind the purpose to be attained, I am of the opinion that the decision of the United States Supreme Court is based upon logic and reason. No other

case has been called to my attention where the question involved was relative priority of the lien of a Carey Act Construction contract, and the lien for assessments of an Operating Company. It seems to have been the purpose and intent, derived from the pertinent statutes and contracts, that those who furnished the money for the construction of a Carey Act project should be reimbursed, and to that end, that a first lien should exist for accomplishing that purpose. If a lien of a Carey Act contract is superior only to liens created by the owner and possessor of the land and is subject to the lien of attachments, executions, materialmen and laborers, then such a lien is of very little value and no one would advance money for the construction of a project.

It is my understanding of the position of plaintiff, that when the Construction Company, its subsidiary, successor, or assigns acquired title to the lands and water rights in question either by foreclosure or deed in lieu thereof, the nature of the title, subject to the right of redemption, was an absolute unqualified one, relieved of all the burdens and obligations of the State Contracts, and said lands and water rights were subject to assessments for mointenance and operation the same as if acquired by some individual having no connection with the Construction Company. I cannot agree with this contention. Suppose that the Construction Company sold a water right to an Entryman and that the Entryman failed to make the necessary improvements on the land for which the water right was sold, and therefore never acquired title to the land, and that the Construction Company, because of default by the purchaser, foreclosed its lien upon the water. Can it be said that the Construction Company could resell such water right in violation of the State Contracts? I think not. The water right would then be subject to the lien of the trust deed, and the situation would be the same as if the water right had never been sold and would be exempt from assessments for maintenance and operation. The Construction Company would still be obligated by the Carey Act statutes and State Contracts to sell the water right to any other Entryman applying therefor. I am of the opinion that where a Carey Act contract has been foreclosed because of default in the payment of the purchase price of the water, or where for that reason a deed has been executed conveying the property to the Construction Company, as was done in this case, that the water right and land is exempt from assessments for maintenance and operation the same as if the contract had never been made and the water stock issued. The stock was not subject to assessment before it was issued, and if in case of default, the Construction Company takes the necessary steps to preserve its security thereby subjects the security to liens for

assessments, operation, attachments, etc., then it would destroy the value of its security by undertaking to protect it. This, to my mind, would be contrary to the clear intent and purpose of the Carey Act laws and contracts. When title to the lands and water rights involved was acquired by the Construction Company or its successor or assigns the trust deed was in existence, and this was true when their assessments were levied by the Operating Company, and such lands and water rights were subject to the lien of the trust deed, and the lien of the bondholders who furnished the money for the construction of the project would be a prior and paramount lien to that of the Operating Company, even though they had a legal right to levy assessments for maintenance and operation under those circumstances. When title to the land and water rights was acquired by foreclosure or by the acceptance of deeds the grantee acquired only a limited ownership and was still subject to the obligation of the State Contract with respect thereto.

Upon a consideration of the facts and record in the Portneuf-Marsh Case, I am convinced that the facts in the instant case are essentially the same, and that the decision in that case is controlling in this case. I have considered the questions of merger and estoppel raised by the plaintiff and they appear to me to be without merit. I am therefore of the opinion that defendant is entitled to judgment with costs. Defendant's counsel are requested to prepare findings-of-fact, conclusions-of-law and decree and serve a copy upon counsel for plaintiff at least ten days before presentation to the Court for signature.

DATED this 21st day of February, 1939.

GUY STEVENS,
District Judge.